Supreme Court, U.S.
FILED
95-624 OCT 17 1995
OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1995

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

SOUTHEASTERN EXPRESS SYSTEMS, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A Georgia insurer having no contacts with California issued to Georgia residents an insurance policy containing a "nationwide" coverage clause, potentially affording the insureds a defense in any state. When the insurer reserved its rights with respect to any duty to defend or indemnify the insureds against a pending lawsuit in California, it was sued for breach of contract and insurance bad faith in the forum. The questions presented are:

1. Is the mere presumption that a nonresident insurer issuing a nationwide liability policy obtains benefit from the economic market of every state constitutionally sufficient to render personal jurisdiction over the insurer in a given forum?

2. Is it constitutionally permissible for a California court to premise jurisdiction upon an inference that a nonresident insurer which has issued a nationwide policy anticipates being sued in any forum in which its insureds do business, and in which they may be sued?

3. Does a nonresident insurer's presumed awareness of its insureds' forum-related activities establish sufficient minimum contacts between the insurer and the State of California to permit a California court to exercise personal jurisdiction over the insurer?

4. Is the requisite interest of the forum met by the determination that California has a significant interest in adjudication of bad faith disputes between nonresidents?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings in the Court of Appeal of the State of California are set forth in the caption, as follows: Southeastern Express Systems, a Georgia partnership; George Barnes; Kevin Clark; Gerry Wambolt; and Southern Guaranty Insurance Company of Georgia, a Georgia corporation ("Southern Guaranty".)[1]

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[1] Corporate Disclosure Statement: Petitioner, Southern Guaranty Insurance Company of Georgia is a wholly-owned subsidiary of Southern Guaranty Insurance Company, which in turn is a wholly-owned subsidiary of Winterthur U.S. Holdings, Inc. Winterthur U.S. Holdings, Inc. is itself wholly-owned by Winterthur Swiss Insurance Group, Winterthur, Switzerland. Petitioner and its affiliates do not issue shares to the public.

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Petitioner SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA hereby respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, review of which was denied by the California Supreme Court on July 20, 1995.

Reference to Official and Unofficial Reports

The opinion of the California Court of Appeal, First Appellate District is reported at *Southeastern Express Systems v. Southern Guaranty Insurance Co. of Georgia*, 34 Cal.App.4th 1, 40 Cal.Rptr.2d 216 (1995). A copy of the Slip Opinion is appended hereto as Appendix A ("App. A".)

Statement of Jurisdiction by the United States Supreme Court

The decision of the Court of Appeal of the State of California was reported at 34 Cal.App.4th 1, 40 Cal.Rptr.2d 216 (1995). The Court of Appeal's order denying rehearing was filed May 18, 1995 and is appended hereto as Appendix B ("App. B"). The California Supreme Court's order denying petitioner's Petition for Review was filed July 20, 1995 and is appended to this petition as Appendix C ("App. C").

This Court is vested with jurisdiction to review this matter pursuant to 28 U.S.C. section 1257(3).

Text of Pertinent Constitutional Provisions, Statutes, Ordinances and Regulations

California Code of Civil Procedure section 410.10:

§ 410.10. Defined.

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Amendment XIV, Section 1, United States Constitution:

Section 1. Citizens of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Underlying Insurance Dispute

1. Petitioner Southern Guaranty

Petitioner Southern Guaranty is a Georgia insurance company, having its principal place of business in the State of Georgia.[2] It maintains no physical presence in

[2] Unless indicated by citations to the record below or supported by those documents contained in Appendix D-F, the facts

California in the form of offices, property, or bank accounts. As a Georgia insurer, Southern Guaranty is not authorized to do business in California, and has no agent for service of process in the State. (App. E2, at ¶¶ D, I.) It neither solicits nor issues insurance policies in California, and has not previously defended any insured – or an action brought by an insured against itself – within the State. (App. F2, at ¶¶ E-F.)

2. The Georgia Insurance Contracts

Southern Guaranty issued successive comprehensive liability insurance policies in the State of Georgia to George Barnes dba Southeastern Brokerage Co., an individual; and to Southeastern Express Systems, Inc., a Georgia partnership. Coverage was limited to bodily injury, property damage, personal injury, or advertising injury to which the insurance applied. With respect to advertising injury, the policies contained a "territory of coverage" clause whereby such coverage was extended for covered offenses committed in the "coverage territory." The "coverage territory" was defined to encompass "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada. . . . " The declarations pages pertaining to these policies identified the insureds' type of business as "computer sales." (JA 44-47.)

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set forth below are reflected in the Court of Appeal's opinion appended hereto as Appendix A. The Joint Appendix which comprised the record below is hereinafter referred to as "JA".

3. The Underlying Action

In April 1992, Southeastern Express, Inc., a Georgia corporation, and Georgia resident George Barnes were sued in the United States District Court for the Northern District of California in an action entitled "Triad Systems Corporation v. Southeastern Express, Inc., et al." (United States District Court for the Northern District of California, Action No. C92 1539 FMS.) A second amended complaint filed October 5, 1992 named the following additional defendants: Southeastern Express Company doing business as Southeastern Brokerage Company; Southeastern Express Systems, Inc.; Kevin Clark, and Gerry Wambolt. (JA 102-121.) That action asserted claims for copyright infringement and unfair trade practices, amongst others, stemming from the defendants' alleged unauthorized copying and use of Triad Systems Corporation's software and related manuals.

B. The California Bad Faith Complaint

When Southern Guaranty reserved its rights with respect to any defense or indemnity obligation concerning the federal suit, Southeastern Express Systems, George Barnes, Kevin Clark, and Gerry Wambolt (hereinafter collectively referred to as "Southeastern Express") filed this action in the Superior Court of the State of California, City and County of San Francisco. The action alleged breach of contract and insurance bad faith, seeking recovery of defense costs and extracontractual damages on behalf of Southeastern Express. (App. D.)

C. The Related Georgia Action

On June 9, 1994, Southern Guaranty itself filed a declaratory relief action in the State of Georgia seeking to determine its insurance obligations as respects the "Triad Systems Corporation v. Southeastern Express, et al." action. (*Southern Guaranty Insurance Co. of Georgia v. Southeastern Express Systems, Inc.*, No. 94CV05311 (Ga., Bibb County Ct., filed June 9, 1994.) (App. G.)[3]

D. The Motion to Quash

Southern Guaranty challenged the power of the California superior court to exercise jurisdiction over it by its motion to quash service of summons. By this motion, Southern Guaranty maintained that an exercise of personal jurisdiction pursuant to California's long-arm statute, California Code of Civil Procedure section 410.10, would constitute a violation of due process under the Fourteenth Amendment of the United States Constitution. Alternatively, the Georgia insurer moved to dismiss the action on grounds of forum non conveniens.

The superior court granted the motion to quash and dismissed the action; the court declined to rule on the motion for forum non conveniens, deeming the matter moot.

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[3] Southeastern Express requested that judicial notice of this complaint be taken below. (JA 102-103.) Judicial notice of the Georgia complaint is hereby requested pursuant to Federal Rule of Evidence 201(b).

1. California Court of Appeal Decision and Petitions for Rehearing and Review

Southeastern Express appealed from the judgment of dismissal. The Court of Appeal reversed, concluding that Southern Guaranty had purposefully directed conduct toward the State of California by contracting to provide coverage for its insureds in any state. (App. A13-A14.) It also concluded that Southern Guaranty had obtained benefit from the economic market of all states, including California, by having sold and collected insurance premiums calculated upon a provision of nationwide coverage. (App. A6.) The court further opined that it would not be unreasonable for a California court to exercise jurisdiction over the Georgia insurer. (App. A6-A7.) Accordingly, the court concluded that the Due Process Clause of the Fourteenth Amendment would not be offended by this exercise of jurisdiction. (App. A13-A14.)

Southern Guaranty's petition for rehearing in the Court of Appeal, and petition for review to the Supreme Court of the State of California were summarily denied in turn. (App. B and App. C.)

Following denial of Southern Guaranty's petition for review, Southern Guaranty timely petitions this Court for certiorari.[4]

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[4] Southern Guaranty has moved alternatively to stay further proceedings in this action pending resolution of this petition or to stay or dismiss the matter on grounds of forum non conveniens and shall advise this Court of the resolution of those motions.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The due process issue presented by this case arises in the manner in which the California Court of Appeal exercised personal jurisdiction over a nonresident insurer having no contacts with the state of California. The California court extended jurisdiction on the basis of a nationwide "territory of coverage" clause in an insurance contract entered between a Georgia insurer and its Georgia insureds. In premising jurisdiction on this contractual provision, the court engaged in an unwarranted extension of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny.

In permitting the *insureds'* forum-related activities to dictate its conclusion that Southern Guaranty had purposefully availed itself of the benefits of the forum state, the court returned to abandoned principles of foreseeability. Moreover, it premised its exercise of jurisdiction not on the insurer's *purposeful* contacts with the forum, but rather, on what an insurer in its position *should have known*. Furthermore, the court inferred sufficient minimum contacts from economic benefit in the state presumed to have inured from the insurer's provision of "nationwide" coverage, as well as from the insurer's presumed awareness of the insureds' activities directed to the forum state. Finally, the court overstated the forum's negligible interest in adjudicating this dispute between nonresidents.

In reversing the lower court, the California Court of Appeal concluded that a nonresident insurer with no

contacts with the forum could be susceptible to jurisdiction based upon its issuance of a policy potentially requiring it to defend its insured in any state. The court surmised that an insurer who contracted to provide such coverage knew that its insured was doing business in the forum state, and that the insurer was likewise aware it might be sued by its insured in that forum.

A writ of certiorari should be granted in this instance because the California Court of Appeal has decided a federal question in a manner which conflicts with prior decisions of this Court, as well as the decisions of other states and the Ninth Circuit Court of Appeals. Where not directly at odds with this Court's decisions, the California Court of Appeal's decision presents a significant constitutional issue which should be settled by this Court. This case offers a means by which this Court can provide much-needed guidance regarding the appropriate exercise of jurisdiction over nonresident insurance companies. Southern Guaranty respectfully urges this Court to exercise its power to grant certiorari in this instance.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. *International Shoe* and Its Progeny

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), this Court held that the Due Process clause of the United States Constitution "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state

has no contacts, ties, or relations." (*International Shoe*, 326 U.S. 310, at 319.) A state may exercise jurisdiction over an absent defendant only if the party has "minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (*Id.*, at 316.)

In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), the Court determined that such minimum contacts were met through a nonresident insurer's issuance of a single insurance policy having "substantial connection" with the forum state. (*McGee*, 355 U.S. 220, at 223.) That connection was established through evidence that the contract had been delivered in California, and premiums mailed from California by an insured who was a resident of the state. (*Id.*) In further deference to the insured's resident status, the Court concluded that California had a "manifest interest" in providing its citizens a meaningful forum for adjudication of insurance disputes. (*Id.*)

Not long thereafter, this Court had the opportunity to revisit the *McGee* decision in *Hanson v. Denckla*, 357 U.S. 235 (1958). In that case, the Court distinguished an insurance policy solicited in the forum state from a contract having no connection with the forum in its inception. (*Hanson*, 357 U.S. 235, at 252.) The trust agreement in question was executed in Delaware by a Delaware trust company and settlor domiciled in Pennsylvania. Although various acts of trust administration were performed in Florida, none were deemed akin to solicitation of the contract in *McGee*, *supra*. Noting that the "agreement was entered without any connection with the forum State" of Florida, the Court concluded that the action

could not be characterized as "one to enforce an obligation that arose from a privilege the defendant exercised in Florida." (*Id.*)

In the years since *McGee* and *Hanson*, this Court has had rare occasion to examine the issue of minimum contacts based upon contractual dealings.[5] Instead, the Court has confronted the issue of personal jurisdiction principally in the context of litigation stemming from the distribution of products to distant forums. While acknowledging that the advent of modern communications has prompted relaxation in the limits imposed by the Due Process Clause, these cases have nonetheless adhered to principles of interstate federalism in restricting each state's ability to exercise jurisdiction over nonresident corporations.

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980), this Court reaffirmed that a court's exercise of jurisdiction over a nonresident corporation is dictated foremost by the territorial limitations of the Due Process Clause. Renouncing a line of decisions that had premised jurisdiction on principles of foreseeability, the Court rejected an exercise of jurisdiction over a nonresident automobile distributor based upon use of a single vehicle in the forum state. (*World-Wide Volkswagen*, 444 U.S. 286, 295-296.) The Court emphasized it was not the mere likelihood that the product would find its way into the

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[5] See generally, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) [defendant subject to jurisdiction in Florida by acceptance of Florida franchise and Florida's regulation of business, and agreement to choice-of-law provision in contract favoring Florida.]

forum that was relevant, but "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." (*Id.*, at 297.)

Since *World-Wide Volkswagen, supra,* this Court has consistently stated that foreseeability of an injury or event in another state cannot serve as a "sufficient benchmark" for exercising personal jurisdiction over a nonresident defendant. (See, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, at 474 (1985); see also, *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, at 108-109 (1987).) In *Asahi, supra,* Justice O'Connor, joined by Justices Powell and Scalia, concluded that the mere awareness that a product could be swept into the forum state on the "stream of commerce," could not subject a manufacturer to jurisdiction in the forum, absent additional conduct directed to the forum state. (*Asahi,* 480 U.S. 102, at 112-113.)

B. The Court of Appeal's Finding of Minimum Contacts Based Upon Presumed Economic Benefit in the Forum is in Conflict With the Decisions of This Court

As a principal basis for its determination that Southern Guaranty possessed sufficient minimum contacts to justify an exercise of jurisdiction, the California Court of Appeal opined that Southern Guaranty "sold its policy as one providing nationwide coverage and collected insurance premiums calculated upon that broad coverage, thus deriving benefit from the economic market of all states in

which [the insureds] faced potential business liability, including California." (App. A6.)

The record, however, was devoid of any evidence of Southern Guaranty's calculation of premiums based upon such provision of nationwide coverage. (JA 42-43, 83-91, 93-94, 96-100, 278-279.) The Court of Appeal's decision is thus rooted in a *presumption* that Southern Guaranty derived "benefit from the economic market of all states" in which its insureds might be sued. (App. A6.)

The source of the Court of Appeal's "economic market" test was this Court's recent decision in *Quill Corporation v. North Dakota By and Through Heitkamp*, 504 U.S. 298 (1992). In *Quill*, the Court examined whether the Due Process and Commerce Clauses barred enforcement of a use tax against an out-of-state mail-order house. In addressing the question of due process, the Court noted that in the context of personal jurisdiction, it had increasingly abandoned mechanical tests dependent upon a nonresident corporation's "presence" in the forum:

> Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's in personam jurisdiction even if it has no physical presence in the State. (*Quill*, 504 U.S. 298, at 307.)

In support of this statement, the *Quill* Court cited its earlier decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), which had held that a nonresident's physical presence in the forum was not an essential predicate to jurisdiction, where "a substantial amount of business is transacted solely by mail and wire communications

across state lines. . . . " (*Quill*, 504 U.S. 298, at 307-308, quoting *Burger King*, 471 U.S. 462, at 476 (1985).) In keeping with that expression of jurisdiction, the *Quill* Court concluded that due process requirements were met by the mail-order house's "continuous and widespread solicitation" of resident customers through catalogs and flyers directed to the forum state. (*Id.*, at 308.)[6]

Unlike the nonresident in *Quill*, Southern Guaranty solicited no business in California and issued no insurance policies to California residents. The sole policy at issue was sold and issued in the State of Georgia. Hence the California Court of Appeal erroneously equated *presumed* collateral economic benefit to Southern Guaranty with the active business solicitation of forum residents present in *Quill*.

The Court of Appeal's finding of jurisdiction premised upon a mere presumption of economic benefit conflicts with this Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

In that case, the Court rejected the notion that minimum contacts were satisfied because the purchase of automobiles in New York – from which the distributor earned "substantial revenue" – would not have occurred but for the fact that the vehicles were capable of use in distant forums. (*World-Wide Volkswagen*, 444 U.S. 286, at 298.) The Court held that "financial benefits accruing to

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[6] The Court ultimately held that the Commerce Clause, Art. I, § 8, cl. 3 barred enforcement of North Dakota's use tax against the out-of-state mail-order business. (*Quill*, 504 U.S. 298, at 309-318.)

the defendant from a collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." (*Id.*, at 299.) In the Court's view, the fact that the nonresident defendant may have obtained marginal revenue from products used in the forum state was "too attenuated a contact" to support jurisdiction there. (*Id.*)

The argument rejected by the *World-Wide Volkswagen* Court is analogous to the California Court of Appeal's conclusion that because the coverage afforded by the insurance policy was potentially applicable in California, Southern Guaranty must have obtained premiums attributable to the mobile nature of that coverage. As noted, there was no evidence of record that premiums were calculated or collected on that basis. Accordingly, the court's conclusion was grounded in speculation regarding the conduct of the insurer's business.

Southern Guaranty respectfully submits that an exercise of jurisdiction based upon a court's mere supposition of economic benefit derived from the forum state is an affront to due process. Even assuming that Southern Guaranty obtained marginal revenue from the fact that its coverage potentially extended to the forum, *World-Wide Volkswagen* establishes that such attenuated economic benefit is insufficient to establish the requisite minimum contacts. (*World-Wide Volkswagen*, 444 U.S. 286, at 299.)

C. The Court of Appeal's Decision is in Conflict with the Decisions of This Court Which Have Rejected the Unilateral Activity of Others as a Basis for Jurisdiction Over a Nonresident

The decision of the California Court of Appeal, moreover, placed undue emphasis on the *plaintiffs'* California business activities as a basis for jurisdiction over Southern Guaranty, in contravention of the decisions of this Court.

In *World-Wide Volkswagen, supra,* this Court stressed that an exercise of jurisdiction over a nonresident defendant cannot be based upon the plaintiff's unilateral business activity in the forum.[7] (*World-Wide Volkswagen,* 444 U.S. 286, 297-298.) Rather, the proper focus is upon the *defendant's* conduct directed to the forum state. (*Id.*) Only where a nonresident corporation has itself purposefully conducted activities in the forum, does "it [have] clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation. . . . " (*World-Wide Volkswagen,* 444 U.S. 286, at 297.)

In the area of insurance disputes, some courts have deemed an insurer's actual knowledge of its insured's business activity within the forum sufficient in itself to render the insurer amenable to suit in that state. These cases have primarily involved nonresident insurers who knowingly insured manufacturers of widely-distributed products, and are therefore distinguishable on that basis.

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[7] See also, *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, at 417 (1984).

In *American & Foreign Insurance Association v. Commercial Insurance Co.*, 575 F.2d 980, 981-982 (1st Cir. 1978), the First Circuit Court of Appeals found a Colombian insurer subject to jurisdiction in Puerto Rico. The insured, a Colombian manufacturer of glass bottles, shipped a large quantity of bottles to Puerto Rico. One bottle exploded there, giving rise to an action in the forum. The appeal arose from a default judgment entered against the insurer and its insured. (*American & Foreign*, 575 F.2d 980, 981.)

Noting that the terms of the Colombian policy "assured full knowledge of both the volume of export sales as well as the actual location of the customers," the court concluded that because the insurer had endeavored to insure a "substantial subject of insurance in Puerto Rico" – the insured's bottles – the insurer was thus amenable to suit in the forum. (*American & Foreign*, 575 F.2d 980, 982.) The court also noted that Puerto Rico had an important interest in protecting the rights of its residents who were injured by the product insured. (*Id.*)

The Court of Appeals for the District of Columbia Circuit adopted a similar approach in *Eli Lilly and Co. v. Home Insurance Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied, Falcon Insurance Co. v. Eli Lilly and Co.*, 479 U.S. 1060 (1987), *cert. denied, Home Insurance Co. v. Eli Lilly and Co.*, 479 U.S. 1060 (1987). The question presented was whether nonresident excess insurers could be haled into the District of Columbia court in an impleader action stemming from a products liability suit against the insured. Observing that the insurers knew that the insured distributed its products nationwide, the Court reasoned that they were also aware that the insured could be sued in any state, and that they might in turn be

subject to an impleader action in that forum. (*Eli Lilly and Co.*, 794 F.2d 710, 720.)

In this instance, the California Court of Appeal went one step further than the *American & Foreign* and *Eli Lilly and Co.* courts in presuming both the scope of the insureds' California business activities, and Southern Guaranty's knowledge of those activities. Although the California Court of Appeal concluded that the plaintiffs "operate an interstate business with significant activities here" (App. A13) – and that "insurers of interstate businesses should reasonably anticipate being called into foreign forums" (App. A11) – the record failed to document the extent of Southeastern Express' business activities in California. Moreover, there was no evidence of record that Southern Guaranty *knew* the Georgia individual and partnership it insured were conducting business of an interstate nature.[8] Nor was there evidence that Southern Guaranty knew specifically that they were conducting that business in California. Under the Court of Appeal's decision, then, any insurer with a nationwide coverage clause must be subject to personal jurisdiction in any forum in which its insured is sued – regardless of the insurer's actual knowledge of the insured's specific forum-related activity, and regardless of the absence of the insurer's own contacts with the forum.

The constitutional prerequisite of "purposeful availment" ensures, however, that nonresidents have notice

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[8] Southeastern Express Systems general partner George A. Barnes claimed to have advised his insurance broker to that affect (JA 84-85), however, the broker did not so attest in opposition to the motion to quash (JA 93-94).

that their own interstate activities may subject them to suit in a distant forum. (*World-Wide Volkswagen*, 444 U.S. 286, at 297 (1980).) The result achieved by the California Court of Appeal is tantamount to compelling a nonresident insurer to defend itself in a particular forum based upon the unilateral activities of the plaintiff. As demonstrated, this decision seriously conflicts with the prior decisions of this Court.

D. The Court of Appeal's Decision is in Conflict With Decisions of this Court in Its Resolution of Those Factors Which Govern Whether an Exercise of Jurisdiction Would Be Unreasonable

1. The Court of Appeal's Decision Overstates California's Interest in Adjudicating this Dispute

Even where minimum contacts are present, the Due Process Clause prohibits an exercise of jurisdiction under circumstances that would offend "'traditional notions of fair play and substantial justice.' " (*International Shoe Co. v. Washington*, 326 U.S. 310, at 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, at 463 (1940).)

Consideration of the following factors determines whether an exercise of jurisdiction is reasonable:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' (*Asahi*

Metal Industry Co. v. Superior Court, 480 U.S. 102, at 113 (1987).)

The California Court of Appeal held that it was "neither unreasonable nor unfair to require an insurer who has assumed the responsibility of defending its insured in California to defend itself when it refuses its insured's defense in a suit brought in California." (App. A6.) The court's resolution of the foregoing relevant considerations was plainly erroneous.

Foremost in the Court of Appeal's determination that an exercise of jurisdiction was reasonable was its belief that California possessed an overriding interest in resolving this dispute between nonresidents.[9] Having found Southern Guaranty's contacts with California sufficient, the Court of Appeal promptly concluded that California had a "significant interest in assuring that injuries and losses suffered in the state are afforded insurance coverage." (App. A7.) In addition, the Court of Appeal found that California had a collateral interest in "encouraging fair claims handling practices and holding insurers answerable for bad faith practices." (App. A7.)

In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), the Supreme Court acknowledged that California had an "manifest interest" in providing a forum for resolution of disputes involving *resident* insureds. (*McGee*, 355 U.S. 220, at 223.) The Court's recognition of that

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[9] This Court, however, has emphasized that while the interest of the forum state is of consideration, the central inquiry is whether the "quality and nature" of the nonresident's activity is such that it should be compelled to defend itself in the forum. (*Kulko v. California Superior Court*, 436 U.S. 84, at 92 (1978).)

interest was grounded in the inherent unfairness in requiring a resident to seek redress in a foreign forum. (*Id.*, at 223-224.) In the case of a *nonresident* plaintiff, however, this Court found California's legitimate interest in adjudicating disputes between nonresidents to be "considerably diminished." (*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, at 114 (1987).)

The Court of Appeal's determination that nonresidents such as Southeastern Express should be afforded a California forum for resolution of insurance disputes is in apparent conflict with this Court's decision in *Asahi.*[10] Moreover, to the extent that *McGee* and *Asahi* are themselves incongruous, or fail to settle the issue presented here, Southern Guaranty respectfully submits that this Court should grant certiorari to resolve this question impacting insurance disputes between nonresidents.

Moreover, the significance of California's "collateral interest" in providing a forum for nonresidents seeking reimbursement of defense costs and correlative bad faith damages – benefits which would flow entirely to the nonresident insured – is also called into question by this Court's decision in *Asahi, supra.* No case has previously

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[10] This result was also substantially in conflict with the decisions of other California courts that had found California to have minimal interest in insurance disputes between nonresident insurers and nonresident insureds. (See e.g., *Zimmerman v. Allstate Insurance Co.*, 179 Cal.App.3d 840, 224 Cal.Rptr. 917 (1986) [no interest in deterrent effect of bad faith cause of action upon conduct in Georgia]; *Great-West Life Assurance Co. v. Guarantee Co. of North America*, 205 Cal.App.3d 199, 252 Cal.Rptr. 363 (1988) [interest in dispute between nonresident insurers diminished where plaintiff is not a California resident].)

held that California has any controlling interest in whether a nonresident insured is afforded a defense within the State. *Asahi, supra,* therefore suggests that California's interest in adjudicating a bad faith dispute arising solely between nonresidents should not be used to support the reasonableness of an exercise of jurisdiction.

2. The Court of Appeal's Decision Erroneously Concludes That Any Inconvenience in Adjudicating This Dispute in California did not Preclude an Exercise of Jurisdiction

To the extent that the Court of Appeal's decision failed to weigh the important consideration of convenience to the litigants against an exercise of jurisdiction, the court's decision was inconsistent with this Court's rulings.

As this Court stated in *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102 (1987), the correlative burden upon the defendant in being forced to litigate in a distant forum merits due consideration. (*Asahi,* 480 U.S. 102, at 113-114.) In finding an exercise of jurisdiction over a foreign corporation to be unreasonable, the *Asahi* Court concluded that the plaintiff had failed to demonstrate that it would be *more* convenient to litigate its claim against the nonresident corporation in California, as opposed to in Taiwan or Japan. (*Id.,* at 114.) This and other factors, including the State's minimal interest in adjudicating the dispute, led the Court to conclude that an exercise of jurisdiction would be unreasonable. (*Id.,* at 114-115.)

Here, the California Court of Appeal conceded that "[t]here may be no greater efficiency in resolving this bad faith insurance action in California . . . although this record fails to demonstrate that the efficiency is markedly less." (App. A8.) Accordingly, as in *Asahi, supra,* the record failed to reflect that it was *more* convenient to adjudicate this dispute in California. This consideration should thus have balanced in favor of a finding that an exercise of jurisdiction was unreasonable.

3. The Court of Appeal's Decision Erroneously Concludes that the Shared Interests of California and Georgia Compel an Exercise of Jurisdiction

Although acknowledging that it would be no more efficient to resolve the dispute in California, the Court of Appeal further concluded that California and Georgia had a "shared interest in full and fair indemnification and defense of insured losses [which] would be hindered were [the California court] to categorically deny an insured a local forum to dispute its insurer's refusal to defend an action pending in the state." (App. A8.)

The court's analysis is simply incorrect. In this instance, no frustration of the shared interests of Georgia and California would result from an absence of jurisdiction in California. A parallel action is proceeding in Georgia, thus assuring an alternative forum for resolution of this very dispute. (App. G.) That action will adjudicate the issues of Southeastern Express' entitlement to defense

costs and bad faith damages. Denial of a "local [California] forum" would in no way hinder the shared interests of the states in fair resolution of such insurance disputes.

III.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS IN CONFLICT WITH DECISIONS OF OTHER STATE COURTS AND THE NINTH CIRCUIT COURT OF APPEALS

A. The Court of Appeal's Decision is in Conflict With Those States That Have Declined to Exercise Jurisdiction on the Basis of a Nationwide Coverage Clause

The California Court of Appeal's decision in this case is contrary to several decisions of the highest courts of other states which have declined to exercise jurisdiction on the basis of a nationwide coverage clause.

The Arizona Supreme Court plainly rejected the rationale employed here. In *Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268, 736 P.2d 2 (1987), the nonresident defendant was a Tennessee automobile insurer. The insured was not a resident of Arizona, and the Tennessee insurer had never engaged in business in the forum. (*Batton*, 153 Ariz. 268, 269-270, 736 P.2d 2, 3-4 (1987).) The Court declined to exercise jurisdiction over a breach of contract and bad faith action arising from an automobile accident in Arizona, based solely upon the insurer's issuance of a nationwide policy:

> Issuing an insurance policy providing nationwide coverage is no different than selling a product, such as a car, with a warranty that it is

> fit for its intended use and with the knowledge that it may be used nationwide. *World-Wide Volkswagen* establishes that jurisdiction is improper in either case. (*Batton v. Tennessee Farmers Mutual Insurance Co.*, 153 Ariz. 268, at 272, 736 P.2d 2, at 6.)

The court concluded that the Tennessee insurer did nothing to purposefully avail itself of the Arizona forum. It emphasized that no evidence in the record allowed the court "to infer that [the insurer] conducted its business knowing that it was regularly coming into contact with Arizona." (*Batton*, 153 Ariz. 268, at 272, 736 P.2d 2, at 7.) Consequently, the court declined to exercise jurisdiction over the nonresident carrier.[11]

Similarly absent from the record here is evidence that Southern Guaranty had conducted business knowing it was coming into contact with California. Southern Guaranty issued policies solely to Georgia businesses. It had never been called upon to defend Southeastern Express or any other insured in California. (App. F2, ¶ E.) Insofar as the Court of Appeal found jurisdiction based upon a *presumption* that Southern Guaranty was knowingly directing conduct toward the forum, the court's decision presents an unwarranted extension of *International Shoe, supra*.

The decision of the California Court of Appeal is also inconsistent with the Florida Supreme Court's decision in

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[11] But cf. *Jarstad v. National Farmers Union Property and Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (1976); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W.2d 684 (1991) [contrary result where underlying litigants were residents of the forum state.]

Meyer v. Auto Club Insurance Association, 492 So.2d 1314 (Fl. 1986). In *Meyer*, the Florida Supreme Court rejected the argument that the risk of a loss occurring in Florida was a foreseeable consequence of a Michigan insurer's having issued a policy with a nationwide coverage clause. The Court reasoned that the insurer had no contacts with Florida – the policy had been issued in Michigan, the insurer had no physical presence in Florida, and did not solicit business there – and thus, had no reasonable expectation of being subjected to defending a suit in Florida. (*Meyer*, 492 So.2d 1314, at 1316.)

Also in conflict with the California Court of Appeal's decision is *Waste Management, Inc., et al. v. Admiral Insurance Company*, 138 N.J. 106, 649 A.2d 379 (N.J. 1995), *cert. denied, WMX Technologies, Inc. v. Canadian General Insurance Co.*, 63 U.S.L.W. ___ (U.S. Feb. 21, 1995) (No. 94-987). In *Waste Management, supra*, the New Jersey Supreme Court held that a "territory of coverage" clause was alone insufficient to establish a basis for personal jurisdiction. (*Waste Management*, 138 N.J. 106, at 127-128, 649 A.2d 379, at 389.) While recognizing the trend toward an expansion of jurisdiction, and New Jersey's interest in regulating the field of insurance, the court emphasized that the threshold jurisdictional requirement must still be met: "[T]hat the *defendant* create minimum contacts with this state by purposefully availing itself of some benefit of doing business here." (*Id.*, at 138 N.J. 106, at 128, 649 A.2d 379, at 389.) As the Canadian insurers engaged in no activity within the forum, were not licensed in the state, and had ascertained that their insured did no business in the United States, the court concluded that the mere issuance of the nationwide policy could not compel their presence

in the New Jersey courts. (*Id.*, at 138 N.J. 106, at 128, 649 A.2d 379, at 390.)[12]

Here, the record likewise reflects that Southern Guaranty did no business in the forum state. Moreover, to the extent that the court merely assumed that the insurer must have been aware of its insureds' susceptibility to suit in a California forum, the Court of Appeal's decision is in conflict with New Jersey's resolution of that issue in *Waste Management, supra.*

Other jurisdictions which have addressed the issue, including Wisconsin and Louisiana, have concluded that a contract to defend an insured "in any state" does not connote an agreement to be sued in the state in a first

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[12] Recently, in contrast to New Jersey Court's decision in *Waste Management*, the Minnesota Supreme Court in *Domtar, Inc. v. Niagara Fire Insurance Co.*, 533 N.W.2d 25 (Minn. 1995) determined that a Canadian insurer who issued a policy with a coverage clause requiring it to respond to claims in the United States was subject to jurisdiction in Minnesota for cleanup costs. Citing *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911, 913 (9th Cir. 1990), the court noted that such cases had held that "the insurer *must know* of its insured's contact with the forum state before the court will conclude that the insurer purposefully established minimum contacts with the forum state." (*Domtar*, 533 N.W.2d 25, at 32-33 [Emphasis added].) In *Domtar*, the record reflected that the insurer's entire underwriting file would have contained extensive information regarding the insured's sales, the location of its operations, and its prior claims history. Based upon the information likely contained in the underwriting file, the court concluded that the insured "constructively knew" that the insured had formerly operated a manufacturing facility in Minnesota and might be requested to respond to requests to reimburse for clean-up costs. (*Id.*, at 33.)

party action by that insured, and thus fails to manifest a purposeful availment of the benefits of doing business in the forum. (See, *Marsh v. Farm Bureau Mutual Insurance Co.*, 179 Wis.2d 42, 505 N.W.2d 162 (Wis. App. 1993); *Hall v. Scott*, 416 So.2d 223 (La. App. 1982).) In *Marsh, supra*, the Wisconsin court concluded that an agreement to defend an insured within the forum could not be used as a springboard for jurisdiction:

> The contract was between a Minnesota resident and a business foreign to Wisconsin. The contract was sold and premiums were paid in Minnesota. The contract made a future lawsuit to defend [the insured] in Wisconsin a fore-seeable [sic], and highly likely event. However, an agreement to defend in Wisconsin does not imply an agreement to be sued by him in Wisconsin. The insurance contract does not evince a purposeful availment of the benefits of doing business in Wisconsin. The contract fails to support jurisdiction. (*Marsh*, 179 Wis.2d 42, at 55-56, 505 N.W.2d 162, at 167.)[13]

As demonstrated, in contrast to the California Court of Appeal, the highest courts of a number of states that have considered the issue have determined that a nationwide coverage clause alone may not render a nonresident insured susceptible to jurisdiction in the forum state. A grant of certiorari would serve to resolve this significant conflict amongst these several states.

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[13] The Wisconsin court likewise concluded that the state had only a "minimal interest" in resolving an insurance dispute between a Minnesota resident and an Iowa insurance company. (*Marsh*, 179 Wis.2d 42, at 58, 505 N.W.2d 162, at 168.)

B. The Court of Appeal's Decision is in Conflict With the Ninth Circuit Court of Appeals

There is also direct conflict between the California state appellate court and the Ninth Circuit Court of Appeals regarding the effect of a nationwide coverage clause upon California's exercise of jurisdiction over a nonresident insurer.[14]

In *Hunt v. Erie Insurance Exchange Group*, 728 F.2d 1244 (9th Cir. 1984), the Ninth Circuit held that a nonresident insurer's failure to have drafted an insurance policy so as to exclude the possibility of defending a suit wherever the injured claimant received medical care, did not constitute an act by which the insurer had purposefully availed itself of the privilege of conducting activities within the State of California. (728 F.2d 1244, 1247.) Moreover, the court concluded that the insurer had not purposefully availed itself of a benefit from the state in declining to pay benefits under the policy. (728 F.2d 1244, 1248.) Consequently, the insurer was not subject to jurisdiction, even when, as here, its policy potentially obligated it to defend within the forum.[15]

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[14] The magnitude of this particular conflict is underscored by the fact that a California federal court determines personal jurisdiction over a nonresident defendant in accordance with the law of the forum state. (*Hunt v. Erie Ins. Exchange Group*, 728 F.2d 1244, 1246 (9th Cir. 1984).)

[15] In contrast, the Ninth Circuit found a nonresident malpractice insurer amenable to jurisdiction within California where the insurer had purposefully directed its activities toward insuring *California* physicians. (See, *Haisten v. Grass Valley Medical Reimbursement*, 784 F.2d 1392 (9th Cir. 1986).)

In contrast, the California Court of Appeal determined that Southern Guaranty's issuance of a policy potentially obligating the Georgia insurer to defend its insured in any state rendered the insurer amenable to jurisdiction in California. (App. A.) In this regard, the *Hunt* case is substantially in conflict with the decision of this California Court of Appeal. This case presents this Court the opportunity to resolve the conflict which now exists between California state and federal courts concerning this important jurisdictional matter.

IV.

CONSIDERATION BY THIS COURT IS NECESSARY TO SETTLE THIS IMPORTANT QUESTION OF FEDERAL LAW

As the California Court of Appeal remarked in announcing its decision, the constitutional question presented by this case is narrow, yet important. The issue of personal jurisdiction over a nonresident defendant based entirely upon contractual dealings with another nonresident, is of paramount importance to all those who engage in modern commerce. The nonresident corporation must be fully apprised of the jurisdictional consequences of its contractual relationships with other nonresidents. As demonstrated by this petition, the question has arisen with increasing frequency in the area of insurance disputes, with conflicting results.

This case presents this Court the opportunity to formulate principles which courts may embrace in determining whether to exercise jurisdiction in insurance bad faith actions between nonresident defendants. It is vital that

insurers be alerted whether issuance of a liability policy containing a nationwide coverage clause will subject them to personal jurisdiction in any state. The divergence of opinions amongst state and federal courts suggests that this Court's prior decisions provide no clear guidance regarding resolution of this question. Southern Guaranty respectfully submits that consideration of this matter by this Court is warranted to settle this important constitutional issue.

CONCLUSION

Based upon the foregoing, petitioner Southern Guaranty Insurance Company of Georgia respectfully requests that this Court grant its petition for Certiorari.

Respectfully submitted,

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DATED: October 16, 1995

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SOUTHEASTERN EXPRESS SYSTEMS et al.,

Plaintiffs and Appellants,

v.

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,

Defendant and Respondent.

A066912

(City and County of San Francisco Super. Ct. No. 961044)

(Filed April 19, 1995)

A general partnership and its individual general partners, residents of Georgia, sued their insurance company for breach of contract and bad faith insurance practices for refusing to defend a federal case brought in California. The insurance company, a Georgia corporation, obtained an order quashing service of process for lack of jurisdiction. We reverse the order, holding that an insurance company providing commercial liability insurance to an interstate business covering injuries arising from offenses committed in California has purposefully established minimum contacts with the state and may fairly be subjected to litigation in California when denying a duty to defend alleged losses arising here.

STATEMENT OF FACTS

Respondent Southern Guaranty Insurance Company of Georgia is a corporation organized under the laws of Georgia and maintains its principal place of business in Georgia. Respondent has no physical presence in California – neither offices, property, nor bank accounts. Respondent has never been authorized to do business in California, has never filed a California income tax return, and has no agent for service of process here. Appellants are Southeastern Express Systems, a general partnership organized under the laws of Georgia, and its general partners, George Barnes, Kevin Clark, and Gerry Wambolt, all Georgia residents. Southeastern Express Systems sells and services computers and related equipment manufactured by Triad Systems Corporation (Triad) which are used in the management of automotive parts outlets. Southeastern Express Systems services computers in many states, including California.

In April 1992, appellants were sued by Triad in the United States District Court for the Northern District of California. Triad, based in Livermore, California, invoked the federal court's original and diversity jurisdiction over appellants in prosecuting copyright infringement and other claims. Among other allegations, Triad avers that appellants have infringed its computer software copyrights by making and using illegal copies of its software and manuals.

Appellants tendered to respondent the defense and coverage of the Triad action. Respondent insured appellants under general commercial liability policies which

appellants claimed covered Triad's copyright infringement action as an advertising injury.[1] The insurance policies cover advertising injuries for offenses committed in the "coverage territory," defined as "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada." Respondent says it undertook an investigation to determine if coverage existed, although it is not clear what this investigation entailed. Appellants say the investigation consisted of respondent contacting their California counsel in the Triad case and being furnished documents from that case.

Respondent refused to pay appellants' costs of defense and appellants brought this action for breach of contract and bad faith insurance practices in May 1994. Three weeks later, respondent countered by filing its own complaint in Georgia for declaratory relief. Soon after filing the Georgia action, respondent moved to quash service of process in this action, claiming lack of personal jurisdiction. The motion was granted.

DISCUSSION

The issue on appeal is narrow, but important: Is an insurer providing nationwide commercial liability coverage subject to personal jurisdiction in California in an action brought by its insureds alleging a wrongful refusal to defend losses arising in California?

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[1] The policies were issued to George Barnes d/b/a Southeastern Brokerage Co. and Southeastern Express Systems, Inc., the apparent predecessors to Southeastern Express Systems.

California courts may exercise personal jurisdiction over nonresidents to the full extent permitted by the United States and California Constitutions. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147; Code Civ. Proc., § 410.10.) The constitutional guarantee of due process requires that a nonresident subjected to a state's personal jurisdiction have "minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (*Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316, quoting *Milliken v. Meyer* (1940) 311 U.S. 457, 463.) The relationship among the nonresident defendant, the forum state, and the litigation is the "essential foundation" of personal jurisdiction when a controversy is related to or arises out of a defendant's contacts with the forum.[2] (*Helicopteros Nacionales de Colombia v. Hall, supra,* 466 U.S. at p. 414.) The defendant's "conduct and connection" with the forum state must be such that "he should reasonably anticipate being haled into court there." (*World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.) A nonresident corporation has notice that it is subject to out-of-state litigation if it " 'purposefully avails itself of the privilege of conducting activities within the

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[2] A state's exercise of personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum is called "specific jurisdiction," in counterpoint to "general jurisdiction" where the suit does not arise out of or relate to the defendant's forum contacts but is asserted because the defendant's forum contacts reflect continuous and systematic business conduct. (*Helicopteros Nacionales de Colombia v. Hall (1984)* 466 U.S. 408, 414-416.) We are concerned with "specific jurisdiction" here.

forum State.' " (*Ibid.*, quoting *Hanson v. Denckla* (1958) 357 U.S. 235, 253.)

"Purposeful availment" means "an action of the defendant purposefully directed toward the forum State." (*Asahi Metal Industry Co. v. Superior Court* (1986) 480 U.S. 102, 112, emphasis omitted.) But "purposeful availment" may be established even if the nonresident defendant maintains no offices, property, or employees in the forum. "[I]f a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State." (*Quill Corp. v. North Dakota By and Through Heitkamp* (1992) ___ U.S. ___, ___ [112 S.Ct. 1904, 1910-1911], citing *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 476.) A nonresident defendant who has purposefully directed its activities toward the forum state may not defeat personal jurisdiction absent compelling evidence that jurisdiction would be unreasonable. (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at p. 477; see *Asahi Metal Industry Co. v. Superior Court, supra,* 480 U.S. at p. 113 (listing factors relevant to reasonableness determination).) Where a contract between plaintiff and the nonresident defendant is claimed to constitute the necessary "minimum contacts," the exercise of personal jurisdiction is not dictated by the place of contracting or performance, but is guided by a realistic approach which considers the contractual relationship in its totality, including the terms of the contract and the contemplated future consequences of the obligations assumed. (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at pp. 478-479.)

Here, respondent wrote an insurance contract obligating it to defend and indemnify advertising injuries for offenses committed by appellants in the "coverage territory," defined as "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada." Respondent sold its policy as one providing nationwide coverage and collected insurance premiums calculated upon that broad coverage, thus deriving benefit from the economic market of all states in which appellants faced potential business liability, including California. Also, respondent agreed to defend appellants against lawsuits in California, and thus should reasonably have anticipated being called into our courts.

We believe it neither unreasonable nor unfair to require an insurer who has assumed the responsibility of defending its insured in California to defend itself when it refuses its insured's defense in a suit brought in California. We recognize that an insurer's defense of a bad faith action may necessitate inconveniences exceeding those attending the defense of an insured, since evidence and witnesses from the insurer's home office may have to be produced in a distant forum to refute the plaintiff's allegation of unfair claims handling practices. But a nonresident defendant's inconvenience rarely achieves constitutional magnitude, and fails to do so here. (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at pp. 477, 483-484.) Considerations of convenience may usually be accommodated through a forum non conveniens dismissal or stay.[3] (*Ibid.;* Code Civ. Proc., § 410.30; see

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[3] The trial court ruled respondent's motion to dismiss for forum non conveniens moot since it granted its motion to quash

Stangvik v. Shiley Inc. (1991) 54 Cal.3d 744 (discussing forum non conveniens standards).)

Moreover, once "minimum contacts" have been established, the interests of the plaintiff and the forum often justify even serious burdens imposed upon a nonresident defendant subjected to personal jurisdiction. (*Asahi Metal Industry Co. v. Superior Court, supra,* 480 U.S. at p. 114.) Appellants claim California is a convenient forum because they have counsel here familiar with the underlying suit they are defending and will be able to subpoena Triad officers to establish that the underlying action presents claims within appellants' insurance coverage. We note, however, that appellants are not California residents – a fact which diminishes both their interest in a California forum and California's interest in the controversy. (Cf. *McGee v. International Life Ins. Co.* (1957) 355 U.S. 220, 223 (finding state interest in providing redress for residents when insurers refuse claims).)

Nevertheless, California has a significant interest in assuring that injuries and losses suffered in the state are afforded insurance coverage. (*Watson v. Employers Liability Corp.* (1954) 348 U.S. 66, 72.) California's interests in encouraging fair claims handling practices and holding insurers answerable for bad faith practices are also significant, and would be compromised were we to deny personal jurisdiction over nonresident insurers in bad faith actions alleging wrongful refusal to defend California losses. Also weighing in our determination of whether an

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service of process. On remand, the court may consider whether this action would be more appropriately and justly tried in Georgia.

exercise of personal jurisdiction would offend " 'traditional notions of fair play and substantial justice' " is " 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' " (*Asahi Metal Industry Co. v. Superior Court, supra,* 480 U.S. at p. 113.) There may be no greater efficiency in resolving this bad faith insurance action in California, where the losses allegedly arose, rather than Georgia, where the appellants and respondent reside, although this record fails to demonstrate that the efficiency is markedly less. However, we believe the states' shared interest in full and fair indemnification and defense of insured losses would be hindered were we to categorically deny an insured a local forum to dispute its insurer's refusal to defend an action pending in the state.

No California court has addressed the specific issue we face here, although our decision is guided by the reasoning of earlier cases. Respondent relies heavily upon *Great-West Life Assurance Co. v. Guarantee Co. of North America* (1988) 205 Cal.App.3d 199, in which a Canadian insurance company was found to be beyond California's jurisdiction. The insurer had issued a "blanket bond" insuring losses arising out of occurrences in Canada and the United States. (*Id.* at pp. 202-203.) Its insured, itself a Canadian insurance company, claimed losses from a California employee's fraud. (*Id.* at p. 203.) Important to the court's consideration in affirming an order quashing service of summons upon the insurer was that the insurer was not obligated to defend the insured on any claims, only to indemnify it for losses covered by the bond. (*Id.* at p. 207.) The court contrasted the case from one in which

an insurer obligates itself to defend its insured in the forum (*ibid.*), which is the situation presented here, and which is the situation presented in the more closely analogous case of *McClanahan v. Trans-America Ins. Co.* (1957) 149 Cal.App.2d 171.

In *McClanahan,* personal jurisdiction was asserted over an Alabama auto liability insurer in an action brought by judgment creditors injured in a California automobile collision with the insured. (*McClanahan v. Trans-America Ins. Co., supra,* 149 Cal.App.2d at pp. 171-172.) Neither the insurer, insured nor the judgment creditors were California residents, but the accident occurred here and a judgment for personal injuries and damages had been recovered here against the insured. (*Ibid.*) The court reversed an order quashing service of process upon the insurer sued by the injured motorists to enforce the judgment (*Id.* at pp. 171, 174.) The court noted that "the very nature" of the insurer's business contemplated appearances in California courts since the insurer indemnified losses arising out of automobile accidents occurring anywhere in the continental United States and obligated itself, under its policy, to investigate, defend and indemnify losses in California and other states. (*Id.* at pp. 173-174.)

Respondent argues that *McClanahan* is an "extreme exercise of jurisdiction" and says its holding should be confined to automobile liability insurers, given the uniquely mobile nature of the insured subject matter which makes appearances in foreign courts foreseeable. *McClanahan* is not "extreme." A majority of courts have similarly concluded that a nonresident automobile liability insurer is subject to personal jurisdiction in a third

party's suit in a state in which a covered loss is alleged to have occurred. (*Payne v. Motorists' Mut. Ins. Companies* (6th Cir. 1993) 4 F.3d 452; *Farmers Ins. Ex. v. Portage La Prairie Mut. Ins. Co.* (9th Cir. 1990) 907 F.2d 911, 913-915; *Rossman v. State Farm Mut. Auto. Ins. Co.* (4th Cir. 1987) 832 F.2d 282, 284-287; *Fukaya v. Velho* (D. Guam 1976) 416 F.Supp. 785; *Pugh v. Oklahoma Farm Bureau Mutual Insurance Co.* (E.D. La. 1958) 159 F.Supp. 155, 157-159; *Payne v. Mutual Fire and Auto. Ins. Co.* (Minn. App. 1986) 381 N.W.2d 523; *N.J. Auto. Ins. v. Indep. Fire Ins.* (N.J. Super. Ch. 1991) 600 A.2d 1243, 1245-1247; *Labruzzo v. State Wide Insurance Company* (N.Y. Sup.Ct. 1974) 353 N.Y.S.2d 98, 100-104; *Parker v. Fireman's Ins. Co. of Newark* (S.C. App. 1988) 375 S.E.2d 325; see *Bahn v. Chicago Motor Club* (Md. App. 1993) 634 A.2d 63, 70 (collecting cases adopting the "majority rule").)

Contrary to the position advocated by respondent, many courts have not confined the extension of personal jurisdiction over foreign insurance companies insuring losses arising in the forum to automobile liability insurers. In *American & Foreign Ins. Ass'n v. Commercial Ins.* (1st Cir. 1978) 575 F.2d 980, 981-982, Colombian product liability insurers were found liable to jurisdiction in a third party's Puerto Rico suit alleging that the insured Colombian bottle manufacturer produced a defective bottle which exploded in Puerto Rico. The First Circuit held that the insurers "purposely availed" themselves of the privilege of conducting activities within Puerto Rico by covering the product liability risk arising from the insured's exported bottles. (*Ibid.*) Similarly, a foreign indemnity association insuring an internationally operated ship was subjected to personal jurisdiction in Texas

upon a third party's lien and claim for materials, supplies, and work provided in Texas for the vessel. (*Magnus Maritec Intern., Inc. v. SS St. Panteleimon* (S.D. Tx. 1978) 444 F.Supp. 567, 568.) We believe respondent's proposed distinction between automobile liability insurers and commercial liability insurers fails. Both insurers of rambling automobiles and insurers of interstate businesses should reasonably anticipate being called into foreign forums. Respondent's claim that automobiles are "uniquely" mobile overlooks the mobility of services and goods which today cross state lines with the ease of automobiles, and in greater numbers.

We do note a distinction between first party actions and third party actions which some courts have found significant, although respondent seems unaware of it. In *Bahn v. Chicago Motor Club, supra,* 634 A.2d at p. 70, the Maryland Court of Appeal recognized the majority rule that a nonresident automobile insurer providing nationwide coverage is liable to suit by a third party in the state in which the insured was involved in an automobile accident injuring the third party. (*Id.* at p. 70.) However, *Bahn* held that rule inapplicable to first party actions in which the insured sues its own insurer. (*Id.* at pp. 70-71.) *Bahn,* and other courts, have reasoned that an insurer's agreement to defend and indemnify its insured in any state does not imply an agreement to allow its insured to bring suit against it in any state, and have also contrasted third party suits sounding in tort from first party suits on the insurance contract. (*Ibid; Batton v. Tennessee Farmers Mut. Ins. Co.* (Ariz. 1987) 736 P.2d 2, 6-7; *Hall v. Scott* (La.App. 1982) 416 So.2d 223, 229-230.) While *Bahn* says

courts have unanimously refused jurisdiction over nonresident insurers in first party actions (*id.* at p. 71), it simply is not so. (E.g., *Eli Lilly and Co. v. Home Ins. Co.* (D.C. Cir. 1986) 794 F.2d 710, 720-721, cert. den. (1987) 479 U.S. 1060; *Szalay v. Handcock* (Ark. 1991) 819 S.W.2d 684; *Klein v. Allstate Ins. Co.* (Ga.App. 1991) 413 S.E.2d 777, affd. on other grounds sub nom. *Allstate Ins. Co. v Klein* (Ga. 1992) 422 S.E.2d 863.)

We are not persuaded that a constitutionally significant distinction exists between first party and third party actions against a nonresident insurer providing nationwide coverage. To ask, as *Bahn* does, whether an insurer agreeing to defend and indemnify its insured in any state has impliedly agreed to defend itself against an insured's suit in any state only confuses the relevant question. (*Bahn v. Chicago Motor Club, supra,* 634 A.2d at pp. 70-71.) The day of founding state jurisdiction upon an implied consent theory is long past. Nor do we think it helpful to contrast third party actions for tort damages with first party actions upon the contract, since that analysis imports inappropriate formalistic concerns. Rather, the important question is whether the nonresident defendant has "purposefully availed" itself of the benefits of an economic market in the forum state. (*World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S. at p. 297.) The contractual relationship created by the insurance policy must be judged in its totality. (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at pp. 478-479.) Under these principles, we do not believe the proper exercise of a state's jurisdiction over a nonresident insurer turns upon whether it is sued by a third party suffering damages

from the acts of its insured in the forum, or sued by the insured itself for those losses.

Eli Lilly and Company v. Home Insurance Company, supra, 794 F.2d 710, is instructive. In that case, a drug manufacturer sued several of its product liability insurers for a declaration of its coverage for DES (diethylstilbestrol) injury claims. (*Id.* at pp. 712-713.) In asserting personal jurisdiction over the nonresident insurers, the court found it foreseeable that the insurers would be called into a foreign forum given the nationwide distribution of the insured's products which the insurers were charged with knowing. (*Id.* at pp. 720-721.) Suit by the insured was itself foreseeable since the insured was likely to implead its insurers if a dispute arose over their duty to defend or indemnify. (*Id.* at p. 720.) The court noted that an insurer derives economic benefit from providing broadbased coverage, and accordingly assumes broader obligations reaching into foreign states: "In determining the scope of the risk they have insured, insurers must consider the scale on which its insured has distributed a potentially dangerous product. The broader the distribution the greater the risk – and presumably the higher the premium. Thus insurers cannot be said to have failed to avail themselves, in a conscious and deliberate manner, of the benefits of doing business in those fora in which the insured manufacturer distributes its products." (*Id.* at p. 721.)

Respondent contracted to defend and indemnify claims for advertising injuries arising from its insureds' offenses committed in any state, including California. The insureds operate an interstate business with significant activities here, and have been sued for those activities

which are alleged to have created losses here. Under these circumstances, respondent may not avoid our courts' jurisdiction. "[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." (*Burger King Corp. v. Rudzewicz, supra,* 471 U.S. at p. 474.)

DISPOSITION

The order granting respondent's motion to quash service of process is reversed. On remand, the trial court may consider respondent's alternative motion for dismissal on forum non conveniens grounds. Appellants shall recover their costs on appeal.

Strankman, P.J.

We concur:

Newsom, J.

Stein, J.

Southeastern Express Systems v. Southern Guaranty Insurance
A066912

Trial court:
City and County of San Francisco
Superior Court

Trial judge:
William Cahill

Counsel for appellants:
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COURT OF APPEAL OF THE
STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 1

SOUTHEASTERN EXPRESS SYSTEMS, ET AL.

vs.

SOUTHERN GUARANTY INS.CO. OF GEORGIA

A066912
San Francisco County No. 961044

BY THE COURT:

The petition for rehearing is denied.

Dated: MAY 18 1995

STRANKMAN, P.J. P.J.

C1

First Appellate District, Division One, No. A066912
S046806

IN THE SUPREME COURT OF CALIFORNIA

SOUTHEASTERN EXPRESS SYSTEMS Et Al.,
Appellants

v.

SOUTHERN GUARANTY INSURANCE
COMPANY OF GEORGIA, Respondent

(Filed July 20, 1995)

Respondent's petition for review DENIED.

George, J. is of the opinion the petition should be granted.

LUCAS
Chief Justice

LAW OFFICES OF MALCOLM A. MISURACA
MALCOLM A. MISURACA (Bar No. 33553)
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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Southeastern Express Systems, a Georgia partnership, George Barnes, Kevin Clark, and Gerry Wambolt, Plaintiffs, vs. Southern Guaranty Insurance Company of Georgia, Defendant.	No. 961044 COMPLAINT FOR DAMAGES (Bad Faith Insurance and Contract) (Filed May 20, 1994)

Plaintiffs complain of the defendant as follows:

Parties and Capacities

1. Southeastern Express Systems ("Southeastern Express") is a general partnership organized under the laws of Georgia. George Barnes ("Barnes"), Kevin Clark ("Clark"), and Gerry Wambolt ("Wambolt") are the general partners of Southeastern Express and residents of

Georgia, and they were at all relevant times officers, agents, and employees of Southeastern Express Systems, Inc.

2. Southern Guaranty Insurance Company of Georgia ("Southern Guaranty") is a corporation organized under the laws of Georgia. Southern Guaranty issues policies of insurance for activities and insured events throughout the United States and, where necessary, defends and provides coverage for insured events that take place in the State of California.

General Allegations

3. Southeastern Express is an independent sales and service organization that specializes in sales and service of computers and related equipment made by Triad Systems Corporation ("Triad"). Southeastern Express' headquarters are in Macon, Georgia.

4. Southern Guaranty has insured Southeastern Express and its predecessors and successors with business policies for several years. For a time, Southern Guaranty insured its predecessor George Barnes doing business as Southeastern Brokerage Co. As the insured's business evolved, the insured was changed to Southeastern Express Systems, Inc. Later, the insured became Southeastern Express Systems, a Georgia partnership. These policies cover the business activities of Southeastern Express regardless where they occur in the United States.

5. For the year ended October 25, 1992, Southern Guaranty issued to George Barnes doing business as

Southeastern Brokerage Co. its business policy no. BP09896 and related policy numbers. For the year ended October 25, 1993, Southern Guaranty issued to Southeastern Express Systems, Inc. its business policy no. 00BP0986. A true copy of these two policies ("the Southern Guaranty business policies") is attached to this complaint as Exhibit No. 1. The present Southern Guaranty policy insures Southeastern Express Systems, a partnership. The Southern Guaranty business policies covered Barnes, Clark, and Wambolt as officers, agents, and employees, and later as general partners, of Southeastern Express.

6. The Southern Guaranty business policies insured Southeastern Express, among other things, for "advertising injury," which included (a) an infringement of copyright, title, or slogan, (b) oral or written publication of material that disparaged a person's or organization's goods, products, or services, and (c) oral or written publication of material that violates a person's privacy.

7. In April 1992, Triad sued Southeastern Express, its predecessors, and Barnes, Clark, and Wambolt in the United States District Court for the Northern District of California, No. C92 1539 FMS, in an action entitled *Triad Systems Corporation v. Southeastern Express Co.* ("the Triad federal action").

8. The Triad federal action alleges many facts and claims that fall within the coverage and duty of defense of the Southern Guaranty business policies, including coverage and duty of defense for advertising injury.

9. Essentially, the Triad federal action alleges that Triad owns copyright protection for certain applications,

auxiliary, utility, and diagnostic ("REST") software developed by Triad for its computer hardware, which serves the automotive parts industry.

10. Triad claims that Southeastern Express and Barnes, Clark, and Wambolt infringed Triad's REST and other software copyrights by making and using copies of the software and manuals for the use of the software. Triad claims that this copyright infringement has damaged Triad's business reputation and goodwill and diverted trade and profits from Triad. Triad seeks damages and equitable relief on its claims.

11. Triad's claims fall within the applicable policy periods of the Southern Guaranty business policies.

12. On October 21, 1993, Southeastern Express tendered to Southern Guaranty ("the tender") the defense and coverage of the claims in the Triad federal action under the Southern Guaranty business policies. Prior to the tender, Southeastern Express and the other plaintiffs appropriately and ably defended the Triad federal action through experienced counsel. Southern Guaranty suffered no prejudice under its policies from the filing of the Triad federal action to the tender to Southern Guaranty.

13. Southeastern Express has cooperated fully with requests of Southern Guaranty for information, data, copies of documents, and other materials and disclosures concerning the Triad federal action.

14. Since the tender, Southeastern Express has made several explicit demands on Southern Guaranty for a defense of the Triad federal action. Southeastern Express retained counsel experienced in the issues of the Triad

federal case to defend the case and has incurred to date approximately $1,000,000 in fees and litigation costs to defend the case. These fees and costs continue.

15. Despite repeated demands of Southeastern Express and its cooperation with its insurance carrier, Southern Guaranty refuses to pay the costs of defense of the Triad federal case.

Charging Allegations

Bad Faith Claims Handling

16. Plaintiffs incorporate here ¶¶ 1 through 15 of this complaint.

17. The refusal of Southern Guaranty to accept the defense of the Triad federal action, to pay currently the costs of defense, and to acknowledge coverage for advertising injury and other insured events under the Southern Guaranty business policies is an intentional refusal by the insurance carrier to pay sums known to be due under its insurance policies and to assure the insureds of coverage that is known to be owed under the policies. Southern Guaranty's actions are therefore in bad faith.

18. Southern Guaranty knows that the plaintiffs have retained experienced and able counsel in the Triad federal action, which means that Southern Guaranty can and has taken advantage of the presence of a proper defense in the Trial [sic] federal action without accepting Southern Guaranty's responsibility to pay currently the costs of that defense. This appropriation by Southern Guaranty of the good faith efforts of the insureds without

compliance with the policy and the duty to defend is bad faith.

19. Southeastern Express and the individual plaintiffs seek in this action their accrued, current, and ongoing costs of defense in the Triad federal action from Southern Guaranty in this action, plus the litigation fees and costs incurred by Southeastern Express and the individual plaintiffs in securing the benefits of the Southern Guaranty business policies by this litigation.

Breach of Contract

20. Plaintiffs incorporate here ¶¶ 1 through 15 of this complaint.

21. The failure and refusal of Southern Guaranty to pay currently the costs of defense of the Triad federal action, to acknowledge the duty to defend the action, and to acknowledge the coverage afforded under the Southern Guaranty business policies is in breach of the contracts of insurance on which this action is brought.

22. Plaintiffs have performed all the conditions of the Southern Guaranty business policies that apply to them.

23. As a direct and proximate result of this breach of contract, plaintiffs have suffered damages in the sum of approximately $1,000,000. These damages are continuing and increasing daily.

24. No part of these damages has been paid by Southern Guaranty.

Prayer

25. Plaintiffs pray for judgment as follows:

(a) For damages for bad faith and breach of contract according to proof;

(b) For damages consisting of the litigation fees and costs incurred by the plaintiffs in this action to acquire policy benefits denied to them;

(c) For costs of suit; and,

(d) For such other and further relief as shall be made out in the proof at trial of this action.

Dated: May 20, 1994

LAW OFFICES OF
MALCOLM A. MISURACA

By /s/ Malcolm A. Misuraca
Counsel for the Plaintiffs

[Exhibit 1 Omitted In Printing]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

SOUTHEASTERN EXPRESS SYSTEMS, a Georgia Partnership, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT, Plaintiffs, vs. SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA, Defendant.	Case No. 961044 DECLARATION OF J. STEVEN HOOKS IN SUPPORT OF MOTION TO QUASH DATE: July 8, 1994 TIME: 9:30 A.M. DEPT: 10 ROOM 457 TRIAL DATE: NONE (Filed July 12, 1994)

I, J. Steven Hooks, declare as follows:

A. I am the Assistant Vice-President of Southern Guaranty Insurance Company of Georgia ("SOUTHERN GUARANTY"). If called as a witness, I would competently testify to the following facts, all of which are within my personal knowledge:

B. A true and correct copy of the insurance policies ("the Alleged Policies") attached as Exhibit No. 1 to the Complaint for Damages, Case No. 961044, are attached collectively hereto as Exhibit "A".

C. The Alleged Policies were executed and performed solely in Georgia.

D. SOUTHERN GUARANTY has never been authorized or incorporated to do business in California.

E. SOUTHERN GUARANTY does not employ any California residents.

F. SOUTHERN GUARANTY does not own or rent any property in California.

G. SOUTHERN GUARANTY does not maintain an office, bank account, telephone listing or mailing address in California.

H. SOUTHERN GUARANTY has never filed any state income tax returns in California.

I. SOUTHERN GUARANTY has no agent for service of process in California.

J. None of SOUTHERN GUARANTY'S officers or directors reside in California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that if called as a witness, I could competently testify to the foregoing facts, all of which are within my own personal knowledge.

Executed this the 16th day of June, 1994, at Atlanta, Georgia.

/s/ J. Steven Hooks
J. Steven Hooks

Sworn to and subscribed
before me this 16th day
of June, 1994.

/s/ Barbara B. McClintoch
Notary Public

My Commission Expires:
Notary Public, Gwinnett County, Georgia
My Commission Expires July 20, 1997

[Exhibit A Omitted In Printing]

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Attorneys for Defendant
SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

BY FAX

SOUTHEASTERN EXPRESS SYSTEMS, a Georgia Partnership, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT, Plaintiffs, vs. SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA, Defendant.	Case No. 961044 DECLARATION OF J. STEVEN HOOKS IN SUPPORT OF MOTION TO QUASH (Filed July 12, 1994)

I, J. Steven Hooks, declare as follows:

A. I am the Assistant Vice-President of Southern Guaranty Insurance Company of Georgia ("SOUTHERN

GUARANTY") and have been employed with SOUTHERN GUARANTY for eight (8) years. If called as a witness, I would competently testify to the following facts, all of which are within my personal knowledge:

B. SOUTHERN GUARANTY insures only Georgia businesses.

C. SOUTHERN GUARANTY has never insured any California businesses.

D. SOUTHERN GUARANTY receives no premiums from California from any of its insureds.

E. Based upon diligent inquiry with the underwriting department and based upon my own personal experience, SOUTHERN GUARANTY has never been a defendant in any action in California.

F. Based upon diligent inquiry with the underwriting department and based upon my own personal experience, SOUTHERN GUARANTY has never defended any action in California on behalf of its insureds.

G. Mr. Dortch is not currently an officer or employee of SOUTHERN GUARANTY, and he never has been.

H. Mr. Dortch is an independent insurance agent. SOUTHERN GUARANTY uses approximately 130 independent agents all of which are located in the State of Georgia.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct, and that if called as a witness, I could competently testify to the foregoing facts, all of which are within my own personal knowledge.

Executed this the 12 day of July, 1994, at Atlanta, Georgia.

/s/ J. Steven Hooks
J. Steven Hooks

Sworn to and subscribed
before me this 12th day
of July , 1994 .

/s/ Barbara B. McClintoch
Notary Public

My Commission Expires:
Notary Public, Gwinnott County, Georgia
My Commission Expires July 20, 1997

IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,	94CV05311 D-3
Plaintiff,	CIVIL ACTION FILE NO.
v.	
SOUTHEASTERN EXPRESS SYSTEMS, INC., SOUTHEASTERN EXPRESS SYSTEMS, SOUTHEASTERN BROKERAGE COMPANY, SOUTHEASTERN EXPRESS, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT,	
Defendants.	

COMPLAINT FOR DECLARATORY JUDGMENT

(Filed June 9, 1994)

COMES NOW Southern Guaranty Insurance Company of Georgia, and pursuant to O.C.G.A. § 9-4-1, *et seq.*, brings this Complaint for Declaratory Judgment and shows this Honorable Court as follows:

1.

The Plaintiff brings this Complaint for Declaratory Judgment pursuant to Georgia law because there is an actual controversy of a justiciable nature between the Plaintiff and the Defendants involving the rights and

liabilities of the parties concerning policies of insurance issued by the Plaintiff to the Defendants George Barnes d/b/a Southeastern Brokerage Company and Southeastern Express Systems, Inc., which must be resolved by this Court.

2.

The Defendant Southeastern Express Systems, Inc. is a Georgia corporation with its place of business located at 151 College Street, Macon, Georgia 31210, having its registered agent for service as George A. Barnes, and is subject to the jurisdiction of this Court.

3.

The Defendant George A. Barnes is a resident of Bibb County, and resides at 106 Kenilworth Court, Macon, Georgia 31210, and is subject to the jurisdiction of this Court.

4.

The Defendant Gerry Wambolt is a resident of Bibb County, and resides at 580 Rogers Drive, Macon, Georgia 31210, and is subject to the jurisdiction of this Court.

5.

The Defendant Kevin Clark is a resident of Bibb County, and resides at 104 Carriage Lakes Court, Macon, Georgia 31210, and is subject to the jurisdiction of this Court.

6.

The Defendants Barnes, Wambolt, and Clark are partners, and do business as Southeastern Express Systems and/or Southeastern Express and/or Southeastern Brokerage Company, with its principal place of business at 151 College Street, Macon, Georgia 31210.

7.

Venue and jurisdiction are proper in this Court.

8.

On April 22, 1992, Triad Systems Corporation (Triad), a Delaware Corporation with its principal place of business in Livermore, California, filed suit against Defendants Southeastern Express Systems, Inc. and George Barnes in the United States District Court in the Northern District of California. Subsequently, Triad amended its Complaint and added the Defendants Southeastern Express Co., Southeastern Brokerage Company, Southeastern Systems, Kevin Clark, and Gerry Wambolt. Triad's Complaint alleges, *inter alia*, the following:

Paragraph 22: That the Defendants sold pre-owned Triad hardware and software to third parties without Triad's receipt of the software relicensing fee and without obtaining the transferee's agreement to be bound by Triad's license agreement, that Defendants knew of the Triad original customer's obligation to pay the relicensing fee and to refrain from transferring the software without a license agreement and Defendants intentionally

encouraged Triad's original customers to violate the licensing agreements.

Paragraph 23: That Defendants provided their customers with copies of Triad's manuals which were copyrighted and contained proprietary material without first obtaining permission from Triad in violation of the copyright laws.

Paragraph 24: That the Defendants provided to their customers upgraded versions of the Triad software without obtaining a license from Triad or paying any licensing or relicensing fee to Triad.

Paragraph 25: That the Defendants provided its customers illegal copies of Triad's copyrighted software programs.

Paragraphs 27-31: That the Defendants each breached the confidentiality agreements entered into with Triad by wrongfully disclosing Triad's proprietary information and using such information in competition with Triad.

Paragraphs 32-41: That the Defendants misappropriated Triad's proprietary property (information regarding the operation and service of Triad's hardware and software and the information contained in Triad software) by transferring, selling and using the proprietary property without Triad's consent.

Paragraphs 42-44: That the Defendants have violated the California Business and Professions Code by: misappropriating Triad's trade secrets, by soliciting actual and potential customers of Triad by advertising Defendants' familiarity with Triad's proprietary property, by inducing Triad's customers to violate their licensing agreements

and transferring software in violation of their licensing agreements.

Paragraphs 45-51: That Defendants intended by their actions to interfere with the service and licensing agreements between Triad and their customers in order to intentionally acquire Triad's customers.

Paragraphs 52-60: That Defendants, with full knowledge of Triad's relationships with its current and potential customers, intended to interfere with these relationships for the purpose of depriving Triad of its rights under its licensing agreements with the intent that Triad's customers would become the customers of the Defendants.

Paragraphs 61-70: That Defendants wilfully infringed on Triad's copyrighted software by making and using illegal copies for their own commercial purposes and economic benefit, to solicit customers and to prevent Triad from using these works in Triad's own business.

9.

A true and correct copy of the Complaint and Amended Complaint are attached hereto as Exhibits "A" and "B" and incorporated herein by reference.

10.

Triad's Complaint seeks actual money damages, preliminary and permanent injunctions, statutory damages for copyright infringement, punitive damages, and attorney's fees.

11.

The Plaintiff issued a policy of insurance to George Barnes d/b/a Southeastern Brokerage Co., policy no. BPO 6450, with effective dates of coverage from October 25, 1989, to October 25, 1990.

12.

A true and accurate copy of policy no. BPO 6450, with effective dates of coverage from October 25, 1989, to October 25, 1990 is attached hereto as Exhibit "C" and incorporated herein by reference.

13.

The Plaintiff subsequently issued policy no. BPO 9896, with effective dates from October 25, 1990 to October 25, 1991.

14.

A true and accurate copy of policy no. BPO 9896, with effective dates from October 25, 1990 to October 25, 1991 the policy is attached hereto as Exhibit "D" and incorporated herein by reference.

15.

Policy no. BPO 9896 also lists George Barnes d/b/a Southeastern Brokerage Co. as the named insured and has been renewed on a yearly basis. When this policy was renewed effective October 25, 1992, the policy listed the named insured as Southeastern Express Systems, Inc.

16.

Under the provisions of the referenced policies, the insured was provided with general liability coverage subject to the terms and conditions of the policy.

17.

Policy no. BPO 6450 defines "insured" as follows:

"Insured means each of the following to the extent set forth below:

a. If the named insured is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor and the spouse of the named insured with respect to the conduct of such a business;"

18.

Policy no. BPO 6450 provides coverage as follows:

"SECTION 2 – COMPREHENSIVE BUSINESS LIABILITY

COVERAGE E
BUSINESS
LIABILITY

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, property damage or personal injury caused by an occurrence to which this insurance applies."

19.

Policy no. BPO 6450 defines "bodily injury", "personal injury" and "occurrence" as follows:

> "Bodily injury means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;"
>
> "Personal injury means injury which arises out of one or more of the following offenses committed in the conduct of the named insured's business:
>
> a. False arrest, detention or imprisonment or malicious prosecution;
>
> b. The publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy; except publications or utterances in the course of or related to advertising, broadcasting or telecasting activities conducted by or on behalf of the named insured;
>
> c. Wrongful entry or eviction, or other invasion of the right of private occupancy;"
>
> "Occurrence means an accident, including continuous or repeated exposure to conditions, which results in bodily injury and property damage neither expected nor intended from the standpoint of the insured and with respect to personal injury, the commission of an offense or a series of similar or related offenses;"

20.

Policy no. BPO 6450 provides the following exclusion:

BUSINESS
LIABILITY
EXCLUSIONS Under Coverage E, this policy does not apply:

4. to liability assumed by the insured under any contract or agreement except a contract as defined in this policy;

The policy defines "contract" as follows:

"Contract means any written contract or agreement wherein the named insured has expressly assumed liability for damages to which this policy applies, . . .

21.

Policy no. BPO 6450 also provides the following exclusion:

"2. Personal injury arising out of any publication or utterance described in Item B of the definitions of personal injury:

a. If the first injury is publication or utterance of the same or similar material by or on behalf of the named insured was made prior to the effective date of this insurance; or

b. Concerning any organization or business enterprise or its products or services made by or at the direction of any

insured with knowledge of the falsity thereof."

22.

Policy no. BPO 9896 defines "insured" as follows:

C. WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.

2. Each of the following is also an insured:

Your employees, other than your executive officers, but only for acts within the scope of their employment by you. . . .

23.

Policy no. BPO 9896 provides coverage as follows:

"A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies. . . .

b. This insurance applies:

(2) To:

(a) Personal injury caused by an offense rising out of your business excluding advertising, publishing, broadcasting or telecasting done by or for you;

(b) Advertising injury caused by an offense committed in the course of advertising your goods, products or services; but only if the offense was committed in the coverage territory during the policy period."

24.

Policy no. BPO 9896 defines "advertising injury" as follows:

"Advertising injury" means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of a copyright, title or slogan."

25.

Policy no. BPO 9896 provides the following exclusion:

> B. EXCLUSIONS
>
> 1. Applicable to Business Liability Coverage – This insurance does not apply to:
>
> p. "Personal injury" to "advertising injury":
>
> 1. Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
>
> 2. Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period; . . .
>
> q. "Advertising injury" arising out of:
>
> (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;

26.

Policy no. BPO 9896 provides various conditions which must be fulfilled by the insured as follows:

> 2. Duties in the event of an occurrence, claim or suit
>
> b. If a claim is made or suit is brought against any insured, you must:

(1) Immediately record the specifics of the claim or suit and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or suit as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit;

d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, . . . , without our consent."

27.

As stated above, Triad has filed a lawsuit styled *Triad Systems Corporation v. Southeastern Express Co., a Georgia de facto partnership dba Southeastern Brokerage Company and dba Southeastern Systems; Southeastern Express Systems, Inc., a Georgia corporation; Georgie Barnes, an individual; Kevin Clark, an individual; and Gerry Wambolt, an individual,* which is pending in the United States District Court, Northern District of California, Civil Action File No. C92 1539 FMS and Defendants have asserted entitlement to certain benefits under the above referenced insurance contracts issued by the Plaintiff.

28.

In accordance with the terms of Plaintiff's above referenced policies, Plaintiff shows that it is uncertain as to whether some and/or all of the Defendants qualify as "insureds" under the policies.

29.

In accordance with the terms of Plaintiff's above referenced policies, Plaintiff is uncertain that the allegations made by Triad against the Defendants are covered under the terms of the Plaintiff's policies because they do not constitute "bodily injury", "personal injury", or "advertising injury" under the policy; nor did they arise out of an "Occurrence." In addition, any claims that would be covered under Plaintiff's policies may be excluded because the insured has failed to comply with the notice provisions of the policies. Therefore, the Plaintiff is left uncertain as to its rights and obligations with regard to any insurance coverage applicable to claims arising out of the contract entered into between the Defendants.

WHEREFORE, Plaintiff Southern Guaranty Insurance Company of Georgia prays this Honorable Court grant the following relief:

1. A declaratory judgment regarding the rights and obligations of the parties herein, declaring that Plaintiff's coverage is not applicable to the occurrences complained of by Triad against the Defendants; and

2. That this Court grant to the Plaintiff such other and further relief as the Court deems just, equitable and proper.

Respectfully submitted,

CHAMBERS, MABRY,
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[Exhibits A-D Omitted In Printing]

No. 95-624

Supreme Court, U.S.
FILED
NOV 30 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,

Petitioner,

vs.

SOUTHEASTERN EXPRESS SYSTEMS, GEORGE BARNES, KEVIN CLARK and GERRY WAMBOLT,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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36 pp

QUESTION PRESENTED

1. Is an insurer that provides nationwide commercial liability coverage subject to personal jurisdiction in a California action brought by its insureds alleging against the insurer a wrongful refusal to defend the insureds against a third-party action in California?

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STATEMENT OF THE CASE

Plaintiffs "Southeastern" filed this action in California against Southern Guaranty Insurance Company of Georgia ("Southern Guaranty") for damages for refusal to defend its insured Southeastern Express Systems in *Triad Systems Corporation v. Southeastern Express Systems, Inc.*, U.S. District Court, Northern District of California, No. C92 1539 FMS ("the *Triad* case"). Southeastern seeks to recover the benefits due under the Southern Guaranty policy, as well as statutory and other relief due from a carrier that wrongfully fails to defend its insured. [J.A. 5, 6].

Triad Systems Corporation sued Southeastern in California for copyright infringement and other claims arising from the way that Southeastern advertises and carries on its nationwide business of servicing Triad computers. [J.A. 111-113, 116-118]. Southeastern tendered the defense of the Triad case to Southern Guaranty, which insures Southeastern nationwide under commercial general liability policies issued in Georgia. These policies cover advertising injury, personal injury, and property damage.[1] Southern Guaranty agreed in its policies to defend

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1. Policy BP06450 provides comprehensive business liability coverage for bodily injury, property damage and personal injury which occurs or is committed within the "policy territory." [J.A. 190]. Policy territory is defined as "the United States of America, its territories or possessions, or Canada. . . ." [*Ibid.*].

Policy BP09896 obligates Southern Guaranty to defend the insured and to "pay those sums that the insured becomes legally obligated to pay as damages" due to bodily injury, property damage, personal injury or advertising injury. [J.A. 234]. The policy applies to advertising injury caused by "an offense committed in the course of advertising your goods, products or services; but only if the offense was committed in the 'coverage territory' during the policy period." [*Ibid.*]. Coverage territory is defined as "[t]he United States of America (including its territories and possessions), Puerto Rico and Canada. . . ." [J.A. 241].

Southeastern on insured claims anywhere in "the United States (including its territories and possessions), Puerto Rico and Canada." [J.A. 241].

Southern Guaranty refused to defend Southeastern in the Triad case. After this case for refusal to defend was filed and served, Southern Guaranty filed a second case against Southeastern in Georgia in which it claims to have no duty to defend Southeastern in the Triad case. [J.A. 122-248]. Southern Guaranty moved to quash service in the California action for lack of jurisdiction, based largely on the claim that Southern Guaranty is an insular Georgia insurance carrier — without office, employees, officers, or other physical presence in California. [J.A. 42-43]. The San Francisco Superior Court granted Southern Guaranty's motion to quash. [J.A. 282-283]. Southeastern appealed from that order. [J.A. 290].

The California Court of Appeal reversed, holding that jurisdiction in California is proper over a carrier providing nationwide coverage when the carrier refuses to defend claims arising in California, which is within its coverage territory. *Southeastern Express Systems v. Southern Guaranty Ins. Co.*, 34 Cal. App. 4th 1, 40 Cal. Rptr. 2d 216 (1995). The court of appeal denied rehearing, and the California Supreme Court denied review. While this action was proceeding in the appellate courts, the Triad case was bifurcated and the first trial was held. A jury awarded Triad $738,172 in damages against Southeastern.[2]

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2. *See* appendix A to this brief in opposition. The respondents request that the Court take judicial notice of this verdict under Federal Rule of Evidence 201(b).

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The decision of the California Court of Appeal fits comfortably within the established law of this Court, existing California law, the decisions of the federal courts in the ninth circuit, and the law of a score of other state courts. Southern Guaranty's petition construes the court of appeal's opinion far more broadly than is accurate, and review of that decision by certiorari should be denied.

The court of appeal found that Southern Guaranty by issuing nationwide insurance coverage to Southeastern had received an economic benefit from California and the other states to which this protection ran and that it had contractually agreed to appear here to defend its insured. [Opinion, p. A6, appendix A to Petition]. The court of appeal held that after a suit was filed in California that triggered Southern Guaranty's duty to defend, and Southern Guaranty refused to defend, California had the power to call Southern Guaranty to account in its courts for that breach of Southern Guaranty's policy.

The court of appeal's decision does not, as Southern Guaranty's petition suggests, authorize an insured to drag its insurance carrier into any state court based solely on the provision of nationwide coverage. The decision here limits the exercise of jurisdiction to circumstances where the insurer has refused to appear in a state to defend an insured event in that state under the terms of its nationwide policy. In fact, several states have upheld jurisdiction over a foreign carrier based solely on the existence of

nationwide coverage,[3] but this case, by presenting an insured event in California, does not require that rule to be applied in this case. This case links the insurer to California not only by nationwide coverage, but a present and existing dispute in the California courts for which the insurer was obligated to appear here by its insurance contract.

Southern Guaranty's statement of questions presented does not accurately state the issues arising from the court of appeal's decision. [Petition, pp. i-ii]. Southern Guaranty attacks the decision by isolating on a few factors from the overall analysis. This allows Southern Guaranty the rhetorical device of arguing that each factor is too weak to support a finding of jurisdiction.[4] Southern Guaranty suggests the court of appeal's holding to be far broader than it is by arguing that each piece in the mosaic of jurisdiction is a separate and independent basis for the court's holding. The court of appeal did not base its finding of jurisdiction solely on "a presumption of economic benefit[5]", nor solely on "an

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3. *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 687 (1991) ("contractual definition of the policy territory satisfies the purposeful availment prong of the 'minimum contacts' inquiry."); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 720-721 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987) (jurisdiction found solely on coverage territory); *N.J. Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins. Co.*, 253 N.J. Super. 75, 600 A.2d 1243, 1247 (1991) (same); *Labruzzo v. State-Wide Ins. Co.*, 353 N.Y.S. 2d 98, 102 (1974) (same); *Humble Oil & Refining Co. v. M/V John E. Coon*, 207 F. Supp. 45, 48 (E.D. La. 1962) (same); *Payne v. Mut. Fire & Auto. Ins. Co.*, 381 N.W. 2d 523, 526 (Minn. 1986) (same).

4. This Court has recognized that with questions of personal jurisdiction, there are no bright-line or mechanical rules for evaluating whether a corporation has the requisite contacts with the forum. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Southern Guaranty warps the analysis by breaking down the court of appeal's analysis of the connections between Southern Guaranty and California into severable, bright-line rules.

5. Southern Guaranty's Question Presented, no. 1.

inference of anticipation of suit based on a nationwide policy[6]", nor solely on "a presumption of Southern Guaranty's awareness of its insured's activities in California.[7]" The court of appeal, employing the flexible test mandated by this Court's decisions, found that the assembly or aggregation of factors — including Southern Guaranty's contractual agreement to appear nationwide, its economic benefit from premiums attributed to its California coverage, and its awareness of its insured's activities in California — dictated jurisdiction over Southern Guaranty in the related suit here on the policy. [Opinion, p. A6, appendix A to Petition].

Once the appropriate issue is identified, it becomes clear that the court of appeal's decision is consistent with the holdings of this Court on personal jurisdiction. The decision is also consistent with the majority of state and federal decisions that have considered the issue, virtually all of which have been omitted from discussion in Southern Guaranty's petition. The few opinions cited by Southern Guaranty that conflict with the decision below are the scattered minority of jurisdictions among the several states and the federal circuits on this now-familiar issue.

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6. Southern Guaranty's Question Presented, no. 2.

7. Southern Guaranty's Question Presented, no. 3. This issue is of little relevance to the consideration of the petition. The court of appeal did not explicitly hold that Southern Guaranty had notice of Southeastern's California activities or that such notice was required in order to find jurisdiction over Southern Guaranty. Southern Guaranty does not discuss this issue as phrased in its petition, arguing instead that Southern Guaranty's contact with California was based on Southeastern's unilateral activities.

II.

THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT HOLDING THAT ECONOMIC BENEFITS OBTAINED FROM THE FORUM STATE WILL SATISFY THE DUE PROCESS REQUIREMENT OF "PURPOSEFUL AVAILMENT" TO SUSTAIN AT LEAST LIMITED PERSONAL JURISDICTION.

California's long-arm statute reaches to the limits authorized by the United States Constitution and is subject to the restraints of due process. Cal. Code Civ. P. § 410.10; *Cornelison v. Chaney*, 16 Cal. 3d 143, 147, 545 P.2d 264 (1976). This Court has held that the limits of due process on personal jurisdiction over a nonresident require the nonresident defendant to have such minimum contacts with the forum state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The nonresident "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

A nonresident must anticipate being hailed into court if it "purposefully avails itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 253, *reh'g denied*, 358 U.S. 858 (1958). The benefits and protections of the laws and market place in the forum state dictate that the nonresident stand ready to answer for the results of its activities and its obligations in the state. *Int'l Shoe*, 326 U.S. at 319. The due process clause should give potential defendants the ability to tailor their conduct with "minimal assurance" over where they may be held liable for that conduct. *World-Wide Volkswagen Corp.*, 444 U.S. at 297. Beyond that, it does not go. Once a party has by its

conduct within the state satisfied these minimal limits and benefitted from interstate activities, it may not shield itself in the due process clause from obligations that arose as a matter of course from those activities. *Burger King v. Rudzewicz*, 471 U.S. 462, 474-475 (1985).

Southern Guaranty's lack of offices, agents, or other physical presence in California does not render it immune from jurisdiction in California. "Purposeful availment" may be determined entirely from economic contact with the state. *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 112 S.Ct. 1904, 1910-1911 (1992); *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 901, 902, 458 P.2d 57 (1969). The jurisdictional inquiry looks beyond the physical trappings of presence such as offices and employees to the "commercial actuality" of the defendant's relationship to the forum and its having triggered results of its activity that it is reasonable to require it to explain and account for in California. *Buckeye Boiler Co.*, 71 Cal. 2d at 901-902. In *Quill Corp.*, this Court stated:

> [I]f a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State.

504 U.S. 298, 112 S. Ct. at 1910-1911 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)). Examination of economic contact may be particularly relevant where a contract is involved, and the courts look beyond the bare language of the contract to the entire contractual relationship between the parties. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-479 (1985).

The court of appeal, with considerable care, undertook just such an analysis. The court found that Southern Guaranty had both

contractually bound itself to defend (and perhaps indemnify) Southeastern in California and received economic benefit from its promise. [Opinion, pp. A6, A13-A14, appendix A to Petition]. Southern Guaranty earned premiums from nationwide coverage that it could not have charged for coverage limited to its home state of Georgia, as the cases have emphasized that have examined the allocability of premiums within broad coverage territory.

Insurance companies benefit from issuing nationwide coverage. An insurance carrier earns premium dollars from the risks it assumes; Southern Guaranty took on risks far afield of Georgia.[8] The carrier matches prospective premium dollars against the odds and cost of being called on to defend cases in places remote from its home state. In *Eli Lilly & Co. v. Home Insurance Co.*, the D.C. Circuit discussed this process of matching costs and benefits:

> In determining the scope of the risk that they have insured, insurers must consider the scale on which its insured has distributed a potentially dangerous product. The broader the distribution, the higher the risk — and presumably the higher the premium. Thus insurers cannot be said to have failed to avail themselves, in a conscious and deliberate manner, of the benefits of doing business in those fora in which the manufacturer distributes its products.

794 F.2d 710, 721 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987).

Southern Guaranty argues that courts cannot extrapolate

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8. *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (limitation on policy territory would make policy less marketable).

economic benefit to the insurer from any single state within nationwide coverage. It is difficult to treat this argument as much more than a rhetorical device; that the carrier does not break out its premiums for the insured's benefit does not mean that it maintains no internal calculus to discern whether it is better off writing policies limited to one state, or fifty. Southern Guaranty is saying only that there is no dollar-for-dollar demonstration in the limited record presented by its motion to quash service[9] of that portion of Southeastern's gross premium attributable to its business in California. From this, Southern Guaranty concludes that there is no proof that Southern Guaranty charged *any premium at all* for its California coverage. The same argument can be made for each of the 50 states and several territories to which Southern Guaranty's nationwide coverage ran, from which Southern Guaranty would conclude that none of its premium dollars can be attributed to any state for which Southern Guaranty says it has made no allocation and will countenance none. By refusing to concede earned premiums in any state, Southern Guaranty concludes that it has availed itself of none of them.

Southern Guaranty argues that any minimal economic benefit found in its activities in California is too attenuated to meet due process requirements, citing *World-Wide Volkswagen*. [Petition, pp. 13-14]. This argument yields nothing to Southern Guaranty's promise to defend its insured here. *World-Wide Volkswagen* dealt with a tenuous economic tie — that automobiles were capable of being used in the forum. 444 U.S. at 298-299. Southern Guaranty contracted to defend Southeastern in California and received premiums for that promise.

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9. The plaintiff need only establish *prima facie* facts showing that jurisdiction exists. *Oregon v. Superior Court*, 24 Cal. App. 4th 1550, 1557, 29 Cal. Rptr. 2d 909, *rev. or reh'g denied*, August 18, 1994; *Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995) (*prima facie* showing only where no evidentiary hearing by court).

Southern Guaranty believes it solicited no business within California, nor issued policies to California residents. [Petition, p. 13]. This point might in the strictest sense be true, but not because Southern Guaranty is not transacting business in California. It has simply found a way to do business in California without the immediate expense of an office or agent here. By offering coverage here and by agreeing to defend Southeastern if necessary in California, Southern Guaranty transacts an insurance business in this State even if writing the policy in Georgia was not transacting business in the first instance. Writing a single policy with coverage in California is sufficient to hold Southern Guaranty to jurisdiction here, regardless whether issuing that policy required the carrier to qualify to do business in this State. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 307 P.2d 1023 (1957).

III.

THE CONNECTION BETWEEN SOUTHERN GUARANTY AND CALIFORNIA WAS NOT ESTABLISHED BY UNILATERAL ACTS OF THE INSURED.

There is no requirement that an insurer must have notice of its insured's activities in the forum before the carrier is subject to jurisdiction there, so long as there is coverage and an insured event in the forum.[10] Southern Guaranty claims that this means that the

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10. *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282 (4th Cir. 1987) (jurisdiction; no prior notice to insurer of insured's activity in forum); *Bevins v. Comet Casualty Co.*, 71 Ill. App. 3d 758, 390 N.E. 2d 500 (1979) (same); *McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 307 P.2d 1023 (1957) (same); *Klein v. Allstate Ins. Co.*, 202 Ga. App. 188, 413 S.E. 2d 777 (1991), *aff'd*, 262 Ga. 599, 422 S.E. 2d 863 (1992) (same); *Fukaya v. Velho*, 416 F. Supp. 785 (D.Guam 1976) (same); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E.D. La. 1958) (same); *Farmers Ins. Exch. v. Portage La*

(Cont'd)

unilateral actions of the defendant can render the insurer subject to jurisdiction anywhere. [Petition, pp. 15-18]. It is true that with Southern Guaranty's policy in hand, Southeastern could venture into any state in the union, secure in the belief that it had insurance there. This is precisely what Southern Guaranty signed on for.

If Southern Guaranty did not wish to appear in a California court, it had the option of excluding California from its policy territory or ensuring in underwriting the policy that Southeastern did not conduct business there.[11] Southern Guaranty could also have required that the insured give notice of its intention to conduct business in a new state, but did not.[12]

(Cont'd)
Prairie Mut. Ins. Co., 907 F.2d 911 (9th Cir. 1990) (same); *Humble Oil & Refining Co. v. M/V John E. Coon*, 207 F. Supp. 45 (E.D. La. 1962); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684 (1991) (same).

11. *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (could omit forum from territory); *Fukaya v. Velho*, 416 F. Supp. 785, 787 (D.Guam 1976) (insurer chose to include Guam); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155, 159 (E.D. La. 1958) (insurer could omit forum from territory); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 (9th Cir. 1990) (insurer controls amenability to suit); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 687 (1991) (same).

Southeastern believes that Southern Guaranty or its agents were aware of Southeastern's activities in California, but it is not able to produce evidence to support this argument because no discovery was possible prior to Southern Guaranty's motion to quash.

12. *American & Foreign Insurance Association v. Commercial Insurance Co.*, 575 F.2d 980 (1st Cir. 1978), cited by Southern Guaranty, is not to the contrary. In that case the insurer's policy was structured to give the insurer notice of its insured's operations in Puerto Rico, unlike Southern Guaranty's policy. 575 F.2d at 982. By not structuring the policy to give itself notice of Southeastern's activities, Southern Guaranty has only itself to blame. Furthermore, the court in *American & Foreign* did not indicate that the insured was *required* to show that the insurer had actual knowledge of the insured's activities in the specific forum in order to establish jurisdiction, but noted that
(Cont'd)

Southern Guaranty argues that despite a lack of policy provisions requiring such notice, the law required its insureds to notify Southern Guaranty of their activities outside of Georgia if they wish those activities to be covered. [Petition, p. 17]. Southern Guaranty cites *Eli Lilly and Co. v. Home Insurance Co.*, 794 F.2d 710 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1060 (1987), as authority. This case does not support that view. In *Eli Lilly*, the court found jurisdiction over the nonresident insurer because the insurer agreed to provide nationwide coverage to a nationwide business. 794 F.2d at 720. Southern Guaranty claims that Southeastern never informed Southern Guaranty that Southeastern conducted business on a natiowide scale. [Petition, p. 17]. What else, one must ask, did Southern Guaranty conclude was the reason why Southeastern bought nationwide coverage? Southeastern in fact informed Southern Guaranty's agent that Southeastern conducted business outside of Georgia. [J.A. 260-261].[13] Even if Southeastern had never informed Southern Guaranty of its interstate operations, Southern Guaranty would be subject to jurisdiction in California.[14]

(Cont'd)

the insurer knew that it covered the risk arising from the insured's shipments of goods to each place of delivery. *Ibid.*

13. George Barnes stated in his declaration that:

> Southern Guaranty was made aware through our insurance broker when we purchased insurance from them that we advertised and, more recently, serviced computers in many states. We have been doing so for the several years that we have purchased insurance from Southern Guaranty, and the company has never until now questioned that our coverage was nationwide.

[Declaration of George A. Barnes, ¶9, J.A. 260-261].

14. *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 456 n. 2 (6th Cir. 1993) (rejecting notice argument); *see* cases cited at note 10, above.

Southern Guaranty's argument is not about notice, but its claim that it was Southeastern's unilateral activity that connected Southern Guaranty with California. Several courts have held in explicitly rejecting Southern Guaranty's argument that the agreement to provide nationwide coverage — and the ability of the insurer to control the policy territory — satisfies the requirement that the nonresident be able to reasonably anticipate being haled into California (particularly given the likelihood of litigation where insurance claims are made). *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282, 287 (4th Cir. 1987) (nationwide policy, nature of insurance, and mobility of risk sufficient notice to carrier); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 686-687 (1991); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 914 (9th Cir. 1990) (same).

IV.

THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH DECISIONS OF THE FEDERAL COURTS OF APPEAL.

The leading federal case on jurisdiction over a nonresident insurer is *Rossman v. State Farm Mutual Automobile Insurance Co.*, 832 F.2d 282 (4th Cir. 1987), in which the fourth circuit held that the insurer's agreement to defend its insured in any state subjects the insurer to jurisdiction in a state in which an insured event occurs.[15] In *Rossman*, an Indiana insurer issued an

15. *Rossman* has been approved by several other jurisdictions. *Bahn v. Chicago Motor Club Ins. Co.*, 98 Md. App. 559, 634 A.2d 63, 71 (1993); *Parker v. Fireman's Ins. Co.*, 297 S.C. 166, 375 S.E. 2d 325, 326 (1988); *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 455 (6th Cir. 1993); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684, 686 (1991); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 913-914 (9th Cir. 1990); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W. 2d 223, 227 (Tex.), *reh'g of cause overruled*, (Sept. 11, 1991) (dictum; jurisdiction declined on other grounds); *N.J. Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243, 1247 (1991).

automobile liability policy to an Illinois resident who was involved in a fatal accident in Virginia. The insurer was not qualified to do business in Virginia; it wrote and delivered the policy in Illinois, and the premiums were paid in Illinois. The court found that jurisdiction over the insurer was proper in Virginia:

> As an automobile liability insurer, [the insurer] could anticipate the risk that its clients would travel in their automobiles to different states and become involved in accidents and litigation there.... Here [the insurer] specifically promised to defend its policy-holders from any claim or suit arising from a loss or accident within its policy territory, which included the entire United States.... *[The insurer's] expectation of being haled into court in a foreign state is an express feature of its policy.* If [the insurer] wished to avoid suit in Virginia or any other forum, it could have excluded that state from the "policy territory" defined in the policy. [The insurer] is well aware that such a limitation would make its policy less marketable.

Id. at 286-287.

The ninth circuit reached the same result under Montana law in *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.*, 907 F.2d 911 (9th Cir. 1990), in which one of two insurers on a risk sued the other for breach of contract and bad faith denial of coverage. The defendant insurer was a Canadian company that had issued an automobile insurance policy to Canadian residents involved in an accident in Montana. The Canadian company had never sold insurance in Montana and had no agents there; based on the Canadian insurer's duty to defend, the court nonetheless exercised jurisdiction.

In its analysis, the court relied heavily on *Rossman. Portage La Prairie,* 907 F.2d at 913-914. It also noted that there is a minority of courts that have relied on *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), to find jurisdiction lacking over insurers whose only contact with the forum is the issuance of an insurance policy. The court distinguished *World-Wide Volkswagen* because that case did not involve a duty to defend:

> Unlike the automobile sellers in *World-Wide Volkswagen*, automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. [Citation.] Thus litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. . . . [U]nlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product" — the indemnification and defense of claims — will travel.

Portage La Prairie, 907 F.2d at 914; *see also Rossman*, 832 F.2d at 286. This reasoning is directly supported by the decisions of this Court, as the Minnesota Supreme Court recently noted:

> The approach of asserting personal jurisdiction over insurance companies exemplified by *Farmers Ins. Exch.* faithfully observes the Supreme Court's emphasis in contract cases on the future consequences contemplated by the parties when executing the contract. In the general liability insurance context, the parties contemplate that the insurer will defend and indemnify the insured.

> Further, the defense is presumably contemplated to occur where the insured is sued.

Domtar Inc. v. Niagara Fire Ins. Co., 533 N.W. 2d 25, 32 (Minn. 1995).

In *Payne v. Motorists' Mutual Insurance Companies*, 4 F.3d 452, 455-456 (6th Cir. 1993), the sixth circuit held that jurisdiction over a nonresident insurer was proper based on the insurer's agreement to defend its insured in any of the fifty states. The Ohio carrier argued that jurisdiction was not proper in Tennessee to resolve a coverage dispute for an accident in Tennessee under a policy it had issued to an Ohio insured. The insurer argued that it did not have offices, agents, or bank accounts in Tennessee. The sixth circuit followed *Portage La Prairie* and *Rossman*, finding that the insurer had chosen to provide nationwide coverage in order to market its policies and by doing so had purposefully availed itself of the privilege of doing business in Tennessee. 4 F.3d at 456.[16]

Southern Guaranty's reliance on *Hunt v. Erie Insurance Group*, 728 F.2d 1244 (9th Cir. 1984), is hopelessly misplaced. In *Hunt*, the plaintiff was injured in an accident in another state, but moved to California after the accident in order to obtain better medical treatment. She sued her insurer in California. Neither the insured nor the insurer had prior contact with California. The ninth circuit rejected the insured's attempt to insinuate its insurer into a forum that neither party had a prior connection with. *Id.* at 1247-1248.

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16. The sixth circuit noted that there was no significant difference between the burden of attending to the suit concerning coverage and the burden of providing a defense in Tennessee. *Ibid.*

The insurer in *Portage La Prairie*[17] made the same argument that Southern Guaranty bases on *Hunt*. The ninth circuit dismissed this argument, stating:

> The precedent cited by [the insurer] is not controlling. In *Davis*, 861 F.2d at 1161, and *Hunt v. Erie Ins. Group*, 728 F.2d 1244, 1247 (9th Cir. 1984), the forum choice was the result of the plaintiff's unilateral change of residence *after* the occurrence of the tortious event giving rise to the litigation. Here, the forum was the situs of the accident. Unlike *Davis* and *Hunt*, the forum in this case had a substantial connection to the litigation.

Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 914 (9th Cir. 1990) (emphasis in original). The ninth circuit's holding in *Hunt* is a rejection of the argument that an insured may sue its carrier in any state based on the nationwide coverage; it does not contradict the court of appeal's decision to allow jurisdiction under the nationwide coverage provision in a state *in which an insured event has occurred.*

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17. Discussed above at pages 14-15.

V.

THE COURT OF APPEAL'S DECISION IS CONSISTENT WITH CALIFORNIA AND THE MAJORITY OF OTHER STATES THAT HAVE CONSIDERED THIS ISSUE.

McClanahan[18] in California, *Rossman*[19] and the decisions of 18 other jurisdictions[20] — including Southern Guaranty's home

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18. *McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 307 P.2d 1023 (1957).

19. *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987).

20. **Arizona:** *Batton v. Tenn. Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (1987); **Arkansas:** *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684 (1991); **District of Columbia:** *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987); **Georgia:** *Klein v. Allstate Ins. Co.*, 202 Ga. App. 188, 413 S.E. 2d 777 (1991), *aff'd*, 262 Ga. 599, 442 S.E. 2d 863 (1992); **Guam:** *Fukaya v. Velho*, 416 F. Supp. 785 (D. Guam 1976); **Illinois:** *Bevins v. Comet Casualty Co.*, 71 Ill. App. 3d 758, 390 N.E.2d 500 (1979); **Louisiana:** *Giannouleas v. Phoenix Maritime Agencies, Inc.*, 525 So. 2d 1043 (La. 1988), *reversing* 525 So. 2d 1067 (La. App. 1 Cir. 1988); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E.D. La. 1958); *McKeithen v. M/T Frosta*, 435 F. Supp. 572, 578 (E.D. La. 1977); *Humble Oil & Refining Co. v. M/V John E. Coon*, 207 F. Supp. 45 (E.D. La. 1962); **Maryland:** *Bahn v. Chicago Motor Club Ins. Co.*, 98 Md. App. 559, 634 A.2d 63 (1993); **Minnesota:** *Payne v. Mut. Fire & Auto. Ins. Co.*, 381 N.W. 2d 523 (Minn. 1986); **Montana:** *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990); **Nevada:** *Jarstad v. Nat'l Farmers Union Property & Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (Nev. 1976); **New Jersey:** *N.J. Auto. Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243 (1991); **New York:** *Labruzzo v. State-Wide Ins. Co.*, 353 N.Y.S.2d 98 (1974); **Pennsylvania:** *United Farm Bureau Mut. Ins. v. U.S. Fidelity & Guar. Co.*, 501 Pa. 646, 462 A.2d 1300 (1983); **Puerto Rico:** *Am. & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d

(Cont'd)

state of Georgia — hold that nationwide coverage and a duty to defend an action on an insured risk are sufficient to justify jurisdiction over the insurer in an action on the policy. Jurisdiction exists regardless of the insurer's lack of offices, agents, or qualification to do business in the state.[21] The court of appeal found this to be the majority rule. [Opinion, pp. A9-A10, appendix A to Petition].

Southern Guaranty's citations to "conflicting" state cases are

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(Cont'd)
980 (1st Cir. 1978); *United States v. SS Ocean Eagle*, 47 F.R.D. 519 (1969); **South Carolina:** *Parker v. Fireman's Ins. Co.*, 297 S.C. 166, 375 S.E. 2d 325 (1988); **Tennessee:** *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452 (6th Cir. 1993); **Texas:** *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W. 2d 223 (Tex.), *reh'g of cause overruled* (Sept. 11, 1991); *Magnus Maritec Int'l, Inc. v. SS St. Panteleimon*, 444 F. Supp. 567 (S.D. Tex. 1978).

21. *See, e.g., McClanahan v. Trans-America Ins. Co.*, 149 Cal. App. 2d 171, 174, 307 P.2d 1023 (1957); *Klein v. Allstate Ins. Co.*, 202 Ga. App. 188, 413 S.E. 2d 777 (1991), *aff'd* 262 Ga. 599, 422 S.E. 2d 863 (1992); *Szalay v. Handcock*, 307 Ark. 232, 819 S.W. 2d 684 (1991); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710 (D.C. Cir.), *cert. denied*, 479 U.S. 1060 (1987); *Fukaya v. Velho*, 416 F. Supp. 785 (D. Guam 1976); *Bevins v. Comet Casualty Co.*, 71 Ill. App. 3d 758, 390 N.E. 2d 500 (1979); *Giannouleas v. Phoenix Maritime Agencies, Inc.*, 525 So. 2d 1043 (La. 1988), *reversing* 525 So. 2d 1067 (La. App. 1 Cir.); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155 (E.D. La. 1958) (Louisiana law); *Payne v. Mut. Fire & Auto. Ins. Co.*, 381 N.W. 2d 523 (Minn. 1986); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911 (9th Cir. 1990) (Montana law); *Jarstad v. Nat'l Farmers Union Property & Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (1976); *N.J. Auto Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243 (1991); *Labruzzo v. State-Wide Ins. Co.*, 353 N.Y.S. 2d 98 (1974); *Am. & Foreign Ins. Ass'n v. Commercial Ins. Co.*, 575 F.2d 980 (1st Cir. 1978) (Puerto Rico law); *Parker v. Fireman's Ins. Co.*, 297 S.C. 166, 375 S.E. 2d 325 (1988); *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.2d 452 (6th Cir. 1993); *Magnus Maritec Int'l, Inc. v. SS St. Panteleimon*, 444 F. Supp. 567 (S.D. Texas 1978) and *Rossman v. State Farm Mut. Auto. Ins. Co.*, 832 F.2d 282 (4th Cir. 1987) (Virginia law).

not persuasive.[22] *Batton v. Tennessee Farmers Mutual Insurance Co.*, 736 P.2d 2 (Ariz. 1987), is inappropriate because no duty to defend was implicated. [Petition, p. 23-24]. *Batton* noted the rule of *Rossman*, but found that the rule did not apply because "[i]n the present case, no one has sued [the insured] in Arizona." 736 P.2d at 6.

Waste Management, Inc. v. Admiral Insurance Company, 138 N.J. 106, 649 A.2d 379 (1994), is distinguishable and not contrary to the decision of the court of appeal. In *Waste Management*, the nonresident insurers issued policies covering solely immovable risks in other forums and had investigated and determined that they were not covering other additional risks. *Id.* at 384-385, 389. The New Jersey Supreme Court held that the nonresident insurers were not subject to jurisdiction in New Jersey under a nationwide territory provision alone. The court held that there must be a forum-related event apart from nationwide coverage to subject the insurer to jurisd' ction. *Id.* at 389.

Southern Guaranty relies on *Domtar Inc. v. Niagara Fire Insurance Co.*, 533 N.W. 2d 25 (Minn. 1995) for the proposition that an insured must know of the presence of a risk in the forum before being subject to jurisdiction there. *Domtar* involved insurance for toxic waste at a tar-manufacturing site, an immovable risk. Although the court was somewhat more detailed in its assumptions, the court in *Domtar* acted precisely on what the court of appeal did here: it presumed that through its underwriting

22. Southern Guaranty cites to cases from the only two jurisdictions have disagreed with the court of appeal's approach, Wisconsin and Florida. [Petition, pp. 25, 27, citing *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis. 2d 42, 505 N.W. 2d 162 (Wis. App. 1993) and *Meyer v. Auto Club Ins. Ass'n*, 11 Fla. Law Weekly 327, 492 So. 2d 1314 (1986)].

process the insurer had become aware of the insured's activities in the forum. *Id.* at 33.[23]

VI.

THE COURT OF APPEAL CORRECTLY DETERMINED THAT THE EXERCISE OF JURISDICTION IN CALIFORNIA WAS REASONABLE.

Once minimum contacts have been established, the defendant must "present a *compelling case* that the presence of some other considerations would render jurisdiction unreasonable." *Great-West Life Assurance Co. v. Guarantee Co. of North America*, 205 Cal. App. 3d 199, 209, 252 Cal. Rptr. 363 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985)) (emphasis added). To avoid jurisdiction in California, Southern Guaranty needed to demonstrate that the inconvenience of the California forum amounts to a denial of due process. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 224 (1957).[24]

It would be no significant burden to Southern Guaranty to defend itself in California. The witnesses on the duty to defend at issue in this case are Southeastern's officers, its insurance agent in Georgia (who declined to object to appearing as a witness in

23. It is not necessary that the insured have notice of the insureds activities in the forum. *See* above, pages 10-12. The insurer controls the policy provisions and the decision to issue the policy, and should not be able to claim ignorance because of poor underwriting procedures.

24. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), cited by Southern Guaranty, is not applicable. [Petition, pp. 21-22]. In *Asahi*, this Court found that the minimum contact requirements of the due process clause were not met. 480 U.S. at 112-113. Thus, the presumption in favor of the reasonableness of jurisdiction did not apply. *Asahi* also involved an alien defendant, so the burdens of litigating in California were far more severe than those that Southern Guaranty would face litigating in California.

California), and officers or other personnel of Triad Systems Corporation in California or Illinois. [J.A. 83-101]. It is particularly important to Southeastern Express that it be able to pursue its claims against Southern Guaranty in California because it can compel the attendance of these witnesses in California, but not in Georgia.[25] In contrast, Southern Guaranty showed only that there were unnamed persons at Southern Guaranty who might "desire to attend the trial" in California and would therefore find themselves inconvenienced.[26] [J.A. 275].

As this Court recognized almost 40 years ago, with the ever-increasing amount of business done across state lines, the burden on a party sued in a forum other than the one in which it is domiciled is minimal.

> [A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our

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25. The availability of witnesses in the forum supports the exercise of jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. at 223; *Payne v. Motorists' Mut. Ins. Cos.*, 4 F.3d 452, 456 (6th Cir. 1993) (location of the accident and witnesses reasonable forum); *Pugh v. Okla. Farm Bureau Mut. Ins. Co.*, 159 F. Supp. 155, 159 (1958); *N.J. Auto Full Ins. Underwriting Ass'n v. Indep. Fire Ins.*, 253 N.J. Super. 75, 600 A.2d 1243, 1246 (1991) (efficiency favors having forum of accident and witnesses).

26. Southern Guaranty was unable to identify any witness who would be inconvenienced because no one from Southern Guaranty had direct contact with Southeastern Express or Triad Systems from which relevant evidence might emerge on the interpretation of Southern Guaranty's policy. [J.A. 84-85, 93-94]. Only the agent who handled the dealings between Southern Guaranty and Southeastern Express was implicated in negotiations between them which might have produced relevant testimony on the meaning of the policies. [*Ibid.*]. He is not inconvenienced by appearing in California. [J.A. 94].

> national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. *At the same time, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.*

McGee, 355 U.S. at 222-223 (emphasis added).

California has an interest in regulating the conduct of carriers like Southern Guaranty which are otherwise unregulated by California's Insurance Code, yet have an active duty of defense or indemnity in California. This dispute is not insular; it concerns significant economic activity with impacts on California residents. To require nonresidents to litigate elsewhere disputes centered in California would cede to other states the power to decide policies and issues of significant impact on California residents and the California economy.[27]

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27. Guaranty's argument that Georgia provides an adequate forum adds nothing, because an alternative forum will always be available in such disputes. What Southern Guaranty does not disclose is that it hopes to take advantage of antiquated notice rules in Georgia's insurance law to deny Southeastern coverage. *Caldwell v. State Farm Fire & Casualty Ins. Co.*, 192 Ga. App. 419, 385 S.E. 2d 97 (1989) (no coverage where notice late). To allow Southern Guaranty to take this dispute to Georgia would reward Southern Guaranty for its tactics of delay in California and would encourage the filing of reflexive lawsuits.

CONCLUSION

Based on the foregoing, respondents Southeastern Express Systems, George Barnes, Kevin Clark and Gerry Wambolt respectfully request that this Court deny Southern Guaranty Insurance Company's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A — VERDICT FORM
FILED FEBRUARY 3, 1995

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA -
(SAN FRANCISCO BRANCH)

CASE NO. C 92 1539 FMS

TRIAD SYSTEMS CORPORATION, a Delaware corporation,

Plaintiff,

v.

SOUTHEASTERN EXPRESS CO., a Georgia de facto partnership dba SOUTHEASTERN BROKERAGE COMPANY dba SOUTHEASTERN SYSTEMS; SOUTHEASTERN EXPRESS SYSTEMS, INC., a Georgia corporation; GEORGE BARNES, an individual; KEVIN CLARK, an individual; and GERRY WAMBOLT an individual,

Defendants.

SOUTHEASTERN EXPRESS SYSTEMS, INC., a Georgia corporation,

Counterclaimant,

v.

TRIAD SYSTEMS CORPORATION,

Counter-defendant.

VERDICT FORM

Appendix A

1. Has the plaintiff, Triad Systems Corporation ("Triad"), proven by a preponderance of the evidence that the defendants, Southeastern Express Systems, George Barnes, Gerry Wambolt and Kevin Clark (collectively referred to as "Southeastern"), infringed Triad's copyrights when servicing Triad computers?

Yes ✗ No ____

2. If you found Southeastern infringed Triad's copyrights when servicing Triad computers, what amount of money, if any, do you award Triad as damages caused by Southeastern's infringement?

$650,000

3. Has Triad proven by a preponderance of the evidence that Southeastern infringed Triad's copyrights by distributing Triad software when brokering used Triad computers?

Yes ✗ No ____

4. If you found Southeastern infringed Triad's copyrights by distributing Triad software when brokering used Triad computers, what amount of money, if any, do you award Triad as damages caused by Southeastern's infringement?

$76,832

5. Has Triad proven by a preponderance of the evidence that Southeastern is liable for contributory infringement of Triad's copyrights when performing port expansion upgrades?

Yes ✗ No ____

Appendix A

6. If you found Southeastern is liable for contributory infringement of Traid's copyrights when performing port expansion upgrades, what amount of money, if any, do you award Traid as damages caused by Southeastern's contributory infringement?

$11,340

DATED: February 3, 1995

s/ Peter Dito
JURY FOREPERSON

(3)

Supreme Court, U.S.
FILED
DEC 11 [illegible]
CLERK

No. 95-624

In The

Supreme Court of the United States

October Term, 1995

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,

Petitioner,

v.

SOUTHEASTERN EXPRESS SYSTEMS, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, First Appellate District

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I.

INTRODUCTION

Much of Southeastern Express' Opposition is devoted to defending the California Court of Appeal's opinion in relation to the decisional law upon which that court relied in achieving reversal of the result below. The focus of Southern Guaranty's Petition, however, is that manner in which the Court of Appeal overstepped the boundaries of personal jurisdiction as established by this Court, and as properly applied by other jurisdictions in this context.

II.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT

Southeastern Express' discussion of the California Court of Appeal's presumption of economic benefit to Southern Guaranty fails to refute the inconsistencies between the Court of Appeal's opinion, and the decisions of this Court.

For example, Southeastern Express does not challenge Southern Guaranty's contention that the "benefits of an economic market" enjoyed by the nonresident corporation in *Quill Corporation v. North Dakota By and Through Heitkamp*, 504 U.S. 298, at 307 (1992) – namely, profits obtained through systematic solicitation of forum residents – were lacking here.[1]

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[1] As noted in Southern Guaranty's petition, *Quill*, 504 U.S. 298 was the specific authority cited in support of the Court of Appeal's formulation of its presumed economic benefit test. (Petition, pp. 12-13.)

Insofar as Southeastern Express undertakes to distance this case from *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), that effort falls short.

In *World-Wide Volkswagen*, this Court deemed the fact that the foreign manufacturer may have obtained marginal revenue from use of its products in the forum state "too attenuated" an economic contact to support jurisdiction. (*World-Wide Volkswagen*, 444 U.S. 286, at 299.) No more significant economic tie to California is present here. The Court of Appeal reached the opposite result based upon the mere presumption that the insurer earned premiums allocable to California as a result of its issuance of a nationwide policy potentially affording its insured a defense within the forum. (App. A6.) In this instance, then, the economic benefit attributable to the forum was less than "marginal" – it was unsubstantiated. While the Fourth and District of Columbia circuits have sanctioned this presumed benefits approach,[2] Southern Guaranty submits that it conflicts with the views expressed in *World-Wide Volkswagen, supra*.

Southeastern Express claims Southern Guaranty's "promise to defend its insured here" (Opposition, at p. 9) takes this case outside *World-Wide Volkswagen*. Not so. That promise is contingent upon the existence of a covered claim, which has not been established. This conditional promise to respond to a claim contained in an insurance contract is no different than the mere likelihood that an automobile manufacturer's product may be

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[2] See, *Rossman v. State Farm Mutual Automobile Insurance Co.*, 832 F.2d 282, 287 (4th Cir. 1987); *Eli Lilly and Co. v. Home Insurance Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986).

used in a foreign jurisdiction. Neither connotes purposeful availment of the benefits of conducting business activity within the forum. (*World-Wide Volkswagen*, 444 U.S. 286, 297.)

Southeastern Express is also incorrect in its assertion that a nonresident insurer's knowledge of its insured's forum-based business activities is irrelevant to a court's examination of jurisdiction. (Opposition, pp. 10-13.)[3] Such knowledge is elemental to the constitutional inquiry at hand: whether the *defendant* purposefully directed its conduct toward the particular forum state. (*World-Wide Volkswagen*, 444 U.S. 286, 297-298.) The Court of Appeal concluded that Southern Guaranty had assumed obligations with respect to Southeastern Express' "significant activities" in California. (App. A13-A14.) Where the record failed to establish Southern Guaranty's awareness of Southeastern Express' interstate business activities, that knowledge could not be inferred, then used as evidence of Southern Guaranty's *purposeful* activity directed toward the forum.

Contrary to Southeastern Express' assertion, Southern Guaranty also made out a compelling case that California's exercise of jurisdiction would violate established

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[3] Southeastern Express claims Southern Guaranty argues that " . . . the law required its insureds to notify Southern Guaranty of their activities outside of Georgia if they wish those activities to be *covered*." (Opposition, at p. 12, citing Petition, p. 17 [Emphasis added].) This characterization misrepresents Southern Guaranty's stated argument. Southern Guaranty takes no position on the effect of an insured's lack of notice of its interstate activities on the provision of *coverage*. (See, Petition, p. 17.)

considerations of "fair play and substantial justice." (*International Shoe Co. v. Washington*, 326 U.S. 310, at 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, at 463 (1940).) As demonstrated, the California Court of Appeal's decision disregarded or misapplied those considerations.

Southeastern Express avoids direct examination of California's indisputable lack of interest in adjudicating disputes between nonresidents by professing that this case involves "issues of significant impact on California residents and the California economy." (Opposition, at p. 23.) The issues of insurance coverage and bad faith presented by this action, however, arise solely as between Georgia residents. This Court has held, and Southeastern Express does not contest, that California's legitimate interest in adjudicating controversies between nonresidents is "considerably diminished." (*Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, at 114 (1987).) Southeastern Express' efforts to elevate this action to one implicating "significant economic activity with impacts on California residents" (Opposition, at p. 23) cannot reasonably be entertained.

Southeastern Express is also wrong in arguing that Southern Guaranty would incur no significant burden in being compelled to defend against this action in California. Although this Court has observed that the advent of "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity," (*McGee v. International Life Insurance Co.*, 355 U.S. 220, at 223 (1957)), it is undisputed that Southern Guaranty conducts

no business and maintains no physical presence in California. The insurance policy at issue was negotiated and delivered in Georgia. Hence, those witnesses relevant to this bad faith litigation are located primarily in Georgia – not California, as Southeastern Express maintains. (JA 83-101; JA 275.)[4] The burden that would be imposed upon Southern Guaranty were it required to defend against this contractual claim in California would be substantial.

Finally, Southeastern Express does not deny, nor can it, that the shared interests of California and Georgia fail to support California's exercise of jurisdiction over this litigation stemming from issuance of a Georgia insurance policy. For those reasons set forth in Southern Guaranty's petition, no frustration of the shared interests of these alternative forums would ensue from California's denial of jurisdiction. (Petition, at pp. 22-23.)

III.

THE COURT OF APPEAL'S DECISION IS INCONSISTENT WITH DECISIONS OF THE FEDERAL COURTS OF APPEAL AND OTHER STATE COURTS

Southeastern Express' effort to dispel the conflict between the Court of Appeal's decision and *Hunt v. Erie Insurance Group*, 728 F.2d 1244 (9th Cir. 1984) fails to

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[4] Southeastern Express has consistently argued that the officers and personnel of Triad Systems are witnesses essential to adjudication of this dispute. Given the narrow issues of insurance coverage and bad faith presented by this action – and the posture of the underlying case – their potential value to this litigation is questionable, at best.

consider the incongruous positions taken regarding the effect of an agreement to defend on the issue of personal jurisdiction. Whereas the California court held that a nationwide coverage clause and disputed defense obligation thereunder rendered Southern Guaranty amenable to suit in California, (App. A) in *Hunt, supra,* an agreement to defend in the forum, and refusal to pay policy benefits, were insufficient to constitute purposeful availment of the benefits of the forum state. (728 F.2d 1244, 1247-1248.)

The cases cited by Southeastern Express as supporting an absence of conflict amongst the federal courts of appeal are themselves distinguishable. *Rossman v. State Farm Mutual Automobile Insurance Co.,* 832 F.2d 282 (4th Cir. 1987) involved a declaratory judgment action instituted against a foreign automobile insurer by a resident of the forum state. Similarly, in *Farmers Insurance Exchange v. Portage La Prairie Mutual Insurance Co.,* 907 F.2d 911 (9th Cir. 1990), the plaintiff insurer sought reimbursement from a Canadian automobile insurer in connection with that insurer's refusal to defend a resident of the forum. The court's determination that the Canadian insurer could anticipate the likelihood of automobile use and ensuing litigation in Montana rested upon that insurer's status "as an automobile liability insurer." (907 F.2d 911, at 914.) *Payne v. Motorists' Mutual Insurance Companies,* 4 F.3d 452 (6th Cir. 1993) likewise involved a declaratory judgment action brought by an injured motorist against a foreign automobile insurer.

Of those state cases cited by Southeastern Express as being consistent with the California Court of Appeal's

exercise of jurisdiction over Southern Guaranty[5], most involved litigants who, unlike Southeastern Express, were residents of the forum state.[6] In other cases, jurisdiction rested on additional factors such as the presence of a narrow territorial limitation provision in the policy,[7] or policy renewals directed to the forum state.[8] Further, Southeastern Express' citation of *United Farm Bureau Mutual Insurance v. U.S. Fidelity & Guaranty Co.*, 501 Pa. 646, 462 A.2d 1300, 1301 (1983) actually supports Southern Guaranty's position that personal jurisdiction predicated upon a nationwide coverage clause is inappropriate.

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[5] See, authorities cited in Opposition, p. 18, note 20.

[6] *Szalay v. Handcock*, 307 Ark. 232, 819 S.W.2d 684 (1991) [action by resident insured]; *Bevins v. Comet Casualty Co.*, 71 Ill.App.3d 758, 390 N.E.2d 500 (1979) [action involving West Virginia judgment obtained by resident claimant]; *Jarstad v. National Farmers Union Property & Casualty Co.*, 92 Nev. 380, 552 P.2d 49 (Nev. 1976); [action by resident insured]; *New Jersey Automobile Full Insurance Underwriting Assn. v. Independent Fire Insurance Co.*, 253 N.J. Super. 75, 600 A.2d 1243 (1991) [direct action by resident claimant]; *Labruzzo v. State Wide Insurance Co.*, 353 N.Y.S.2d 98 (1974); [direct action by resident claimant]; *Parker v. Fireman's Insurance Co. of Newark*, 297 S.C. 166, 375 S.E.2d 325 (1988) [direct action by resident claimant]; *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223 (Tex. 1991) [action by resident insured].

[7] *Payne v. Mutual Fire & Automobile Insurance Co.*, 381 N.W.2d 523 (Minn. 1986).

[8] *Bahn v. Chicago Motor Insurance Club*, 98 Md.App. 559, 634 A.2d 63 (1993).

CONCLUSION

The California Court of Appeal's exercise of jurisdiction over a nonresident insurer possessing no cognizable contacts with the forum state is an affront to due process. An exercise of personal jurisdiction based upon a contingent contractual provision in an insurance policy between nonresidents runs contrary to the decisional law of this Court, and of a number of those jurisdictions that have considered the issue.

Certiorari should be granted in this instance to address and settle this important constitutional issue.

Respectfully submitted,

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DATED: December 8, 1995